Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 468)

Supreme Court of the United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN AND SIDNEY STEINBERG, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 14, 1956

CERTIORARI GRANTED OCTOBER 8, 1956

No. 14359

United States
Court of Appeals
for the Ninth Circuit

SHIRLEY KREMEN, CARL ROSS, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 468, inclusive)

Appeals from the United States District Court for the Northern District of California, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Appeal:
- Certificate of Clerk to Transcript of Record on 86
- Designation of Record on (DC) 82
- Notice of (Carl Ross) 77
- Notice of (Samuel I. Coleman) 78
- Notice of (Shirley Kremen) 76
- Notice of (Sidney Steinberg) 79
- Order Extending Time Within Which to Docket Record on 85
- Statement of Points on (DC) 80
- Statement of Points on (USCA) 940

Certificate of Clerk to Transcript of Record .. 86

Designation of Record on Appeal (DC) 82

Docket Entries, Excerpts from 72

Indictment 3

Instructions Proposed by Defendants 29

Judgments and Commitments:
- Samuel I. Coleman 67
- Shirley Kremen 62

Judgments and Commitments—(Continued)
Carl Ross 64
Sidney Steinberg 69

Motion for Bill of Particulars 15

Motion for Discovery and Inspection 14

Motion for the Issuance of Pretrial Subpoena 17

Motion to Dismiss 9

Names and Addresses of Attorneys 1

Notices of Appeal:
Samuel I. Coleman 78
Shirley Kremen 76
Carl Ross 77
Sidney Steinberg 79

Notice of Motion for the Return of Seized Property 18
Affidavit of Sidney Steinberg 19

Notice of Motion for the Return of Seized Property and Its Suppression As Evidence (Shirley Kremen) 22

Notice of Motion for the Return of Seized Property and Its Suppression As Evidence .. 23
Affidavit of Patricia Julia Blau 24

Order Denying Motion for Return of Seized Property and Granting Motion to Dismiss Said Motion 26

Order Extending Time Within Which to Docket Record on Appeal 85
Affidavit of Norman Leonard 85

Statement of Points on Appeal (DC) 80

Statement of Points to be Relied Upon on Appeal (USCA) 940

Transcript of Hearing on Motion to Suppress Evidence and Motion to Return Seized Property, April 5, 1954 89

Witnesses for the Defendants:

Germany, Thelma L.
—direct 134

Morrow, James
—direct 136

Whelan, William H.
—direct 89
—cross 129
—redirect 132

Transcript of Excerpt of Voir Dire Examination of Jury, April 12, 1954 139

Transcript of Opening Statement in Behalf of Plaintiff, April 12, 1954 143

Transcript of Proceedings on Motion to Suppress Evidence, April 13, 1954 164

Witnesses for Defendants:

Erickson, Roy
—direct 165
—cross 169

Shedd, John Edward
—direct 170

Transcript of Proceedings and Testimony, April 12-April 26, 1954 181
Instructions to the Jury 903
Witnesses:
Anderson, Harold G.
—direct 593
Britton, Burnett
—direct 525
—cross 529
Butler, Mrs. Roger
—direct 694
—cross 696
Butler, Roger George
—direct 697
—cross 698
Capozzi, Henry
—direct 604
Citron, Nathan J.
—direct 815
—cross 818
Collins, Ida
—direct 768
—cross 771
Dahlgren, Helding L.
—direct 860
—cross 872
Daly, Joseph T.
—direct 383
—cross 388
—redirect 405
—recross 405

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Darden, Robert
—direct 793

Donner, Walter C.
—direct 565
—cross 571

Dunker, Clarence W.
—direct 372
—cross 379

Eagan, James F.
—direct 355

Ellis, Glenn F.
—direct 715
—cross 721
—redirect 722

Erickson, Roy L.
—direct 183, 200, 224
—cross 271
—redirect 312
—recross 318

Germany, Charles E.
—direct 667
—cross 672

Ground, Albert B.
—direct 442
—cross 463
—redirect 490
—recross 491

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Hannan, William L.
—direct 357
—cross 358

Hanson, Audrey
—direct 611
—cross 615

Harter, Glenn A.
—direct 359
—cross 366

Henrichsen, Dorothy
—direct 700
—cross 702
—redirect 714
—recross 714

Lackey, Michael
—direct 675
—cross 678
—redirect 680

Lackey, Ruth
—direct 681
—cross 684

Lautner, John
—direct 502
—recalled, direct 853
—cross 854
—redirect 857

Lichtenstein, Leonard
—direct 543

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

McCann, Joseph P.
—direct 321, 331
—cross 336
—redirect 349, 353
—recross 351

Mecca, Maxine
—direct 819
—cross 829

Meredith, Lucille
—direct 803
—cross 804

Meyers, Odie E.
—direct 573
—cross 578

Moody, Phillip J.
—direct 787
—cross 789

Morrow, James
—direct 619
—cross 627, 662
—redirect 666

Munger, Robert
—direct 836

Olsen, Walter J.
—direct 810
—cross 814

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Prelsnik, Charles J.
—direct 723, 734
—cross 738

Price, Andrew M.
—direct 806
—cross 807

Rosenstein, Dr. Isaac
—direct 607

Rouse, D. E.
—direct 797
—cross 799

Smith, Frank J.
—direct 419
—cross 437

Sotzien, Harry L.
—direct 777
—cross 781
—redirect 785
—recross 785

Spencer, E. M.
—direct 598

Todt, Alfred
—direct 553
—cross 558

Walton, Woodrow
—direct 546

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Warren, Henry James
—direct 407
—cross 413
—redirect 419

Verdicts:

Samuel Irving Coleman 61
Shirley Kremen 60
Carl Ross 60
Sidney Steinberg 61

	Original	Print
Proceedings in the U. S. C. A. for the Ninth Circuit	942	943
Argument and submission (omitted in printing)	942	
Order directing filing of opinions and filing and recording of judgment	943	943
Opinion, Lemmon, J.	944	943
Opinion, Healy, J.	985	984
Dissenting opinion, Denman, C.J.	985	985
Judgment	994	992
Order denying petition for rehearing	995	993
Clerk's certificate (omitted in printing)	996	
Order extending time to file petition for writ of certiorari	997	993
Order allowing certiorari	998	994

NAMES AND ADDRESSES OF ATTORNEYS

GLADSTEIN, ANDERSEN & LEONARD
appeared for Defendants, Shirley Kremen, Carl Ross and Samuel Irving Coleman,
240 Montgomery Street,
San Francisco, California.

Defendant Sidney Steinberg appeared in pro per.

Attorneys for Defendants and Appellants.

LLOYD H. BURKE,
United States Attorney,
ROBERT H. SCHNACKE,
Assistant United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
P. O. Bldg., San Francisco, California,

Attorneys for Plaintiff and Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA, Plaintiff,

vs.

SHIRLEY KREMEN, aka LEE KAPLAN; PATRICIA JULIA BLAU, aka JANET CONROY; CARL EDWIN RASI, aka CARL ROSS and ROBERT EDWARD NEWMAN; SAMUEL IRVING COLEMAN, aka WILLIAM B. GORDON; SIDNEY STEINBERG, aka SID STEIN and JOSHUA NEWBERG, Defendants.

INDICTMENT

First Count: (Title 18 U.S.C. 3)

The Grand Jury charges:

1. That on or about the 14th day of October, 1949, Robert G. Thompson was convicted in the United States District Court for the Southern District of New York for the offense of wilfully and knowingly conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence; the aforesaid being in violation of Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act.

2. That on or about the 27th day of August, 1953, in the Northern District of California, in the

vicinity of Twain Harte, Tuolumne County, California, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman, Sidney Steinberg and Carl Edwin Rasi, knowing that the offense aforesaid had been committed and that the said Robert G. Thompson had been convicted of committing the same, did receive, relieve, comfort and assist the said Robert G. Thompson in order to hinder and prevent his apprehension and punishment.

Second Count: (Title 18 U.S.C. 371)

The Grand Jury further charges:

1. That at a time and place to the Grand Jury unknown, in the Northern District of California and elsewhere, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman, Sidney Steinberg and Carl Edwin Rasi, unlawfully, wilfully and knowingly did conspire with each other and with divers other persons to the Grand Jury unknown.

2. That the object of this conspiracy was to commit, in violation of Section 3 of Title 18 United States Code, the offense of receiving, relieving, comforting and assisting Robert G. Thompson, in order to hinder and prevent the apprehension and punishment of the said Robert G. Thompson, while the said defendants well knew that the said Robert G. Thompson had violated Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act.

3. That in pursuance of said conspiracy and to effect the object thereof in the Northern District of

California, one or more of the defendants herein did further the said conspiracy by the following acts:

Overt Acts

(1) On or about the 20th day of June, 1953, in the office of Morrow Realty Company at Twain Harte, California, the defendant Shirley Kremen, while using the name Lee Kaplan, had a conversation with James Morrow concerning the leasing of a cabin located in the vicinity of Twain Harte, California, and owned by Charles E. Germany.

(2) On or about the 25th day of June, 1953, the said defendant Shirley Kremen, using the name Lee Kaplan, signed a lease for the said cabin at the Morrow Realty Company, Twain Harte, California.

(3) On or about the 1st day of August, 1953, the defendant Sidney Steinberg, while using the name Joshua Newberg, had a conversation with the said Charles E. Germany and Mrs. Velma L. Germany at the said cabin located in the vicinity of Twain Harte, California, and owned by the said Charles E. Germany.

(4) On or about the 6th day of August, 1953, at the San Jose Ford Sales Company, 375 South Market Street, San Jose, California, the defendant Patricia Julia Blau, while using the name Janet Conroy, purchased from Walter J. Olson a 1950 Ford Automobile, California License No. 3G1600.

(5) On or about the 13th day of August, 1953, at the said cabin, the defendant Sidney Steinberg, while using the name Joshua Newberg, had a conversation with the said Charles E. Germany and the

said Velma L. Germany in the presence of Carl Edwin Rasi.

(6) On or about the 20th day of August, 1953, defendant Patricia Julia Blau, using the name Janet Conroy, negotiated a check with Mrs. Vida Westfall at the Twain Harte Market, Twain Harte, California.

(7) On or about the 27th day of August, 1953, the defendants, Shirley Kremen, Samuel Irving Coleman, Sidney Steinberg and Carl Edwin Rasi occupied the said cabin with Robert G. Thompson.

Third Count: (Title 18 U.S.C. 1071)

The Grand Jury further charges:

That on or about the 27th day of August, 1953, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman and Carl Edwin Rasi, with notice and knowledge of the fact that a warrant had been issued for the apprehension of Sid Stein, also known and named herein as Sidney Steinberg, did, in the Northern District of California, in the vicinity of Twain Harte, Tuolumne County, California, harbor and conceal, so as to prevent his discovery and arrest, the said Sid Stein, also known and named herein as Sidney Steinberg, for whose arrest a warrant had been issued pursuant to law by the United States District Court for the Southern District of New York.

Fourth Count: (Title 18 U.S.C. 371)

The Grand Jury further charges:

1. That at a time and place to the Grand Jury unknown, in the Northern District of California

and elsewhere, defendants Shirley Kremen, Carl Edwin Rasi, Patricia Julia Blau and Samuel Irving Coleman, unlawfully, wilfully and knowingly did conspire with each other, with Robert G. Thompson, named herein as co-conspirator but not as a defendant, and with divers other persons to the Grand Jury unknown.

2. That the object of this conspiracy was to commit, in violation of Section 1071 of Title 18 United States Code, the offense of harboring and concealing, so as to prevent his discovery and arrest, Sidney Steinberg, while said defendants well knew that a warrant for his arrest, under the name of Sid Stein, had been issued on the 20th day of June, 1951, pursuant to law by the United States District Court for the Southern District of New York.

3. That in pursuance of said conspiracy and to effect the object thereof, in the Northern District of California, one or more of the defendants herein and Robert G. Thompson named herein as a co-conspirator but not as a defendant, did further the said conspiracy by the following acts:

Overt Acts

(1) On or about the 20th day of June, 1953, at Twain Harte, California, in the office of Morrow Realty Company, defendant Shirley Kremen, using the name Lee Kaplan, had a conversation with James Morrow concerning the leasing of a cabin located in the vicinity of Twain Harte, California, and owned by Charles E. Germany.

(2) On or about the 25th day of June, 1953, the

said defendant Shirley Kremen, using the name Lee Kaplan, signed a lease for the said cabin at the Morrow Realty Company, Twain Harte, California.

(3) On or about the 6th day of August, 1953, at the San Jose Ford Sales Company, 375 South Market Street, San Jose, California, the defendant Patricia Julia Blau, while using the name Janet Conroy, purchased from Walter J. Olson a 1950 Ford Automobile, California License No. 3G1606.

(4) On or about the 13th day of August, 1953, at the said cabin, defendant Carl Edwin Rasi, was present at a conversation between Sidney Steinberg and the said Charles E. Germany and Mrs. Velma L. Germany.

(5) On or about the 20th day of August, 1953, defendant Patricia Julia Blau, using the name Janet Conroy, negotiated a check with Mrs. Vida Westfall at the Twain Harte Market, Twain Harte, California.

(6) On or about the 27th day of August, 1953, defendants Shirley Kremen, Carl Edwin Rasi, Samuel Irving Coleman, and Robert G. Thompson, named as co-conspirator but not as a defendant, occupied the said cabin with Sidney Steinberg.

A True Bill.

/s/ ROBERT JUN,
Foreman

/s/ LLOYD H. BURKE,
United States Attorney

Approved as to Form: Signed R. H. F.

Indictment: (Violation: Title 18 USC 3—Accessory after the fact; Title 18 USC 371—Conspiracy; Title 18 USC 1071—Harboring).

Penalty: First Count: Imprisonment not to exceed 5 years; fine not to exceed $5,000. Second Count: Imprisonment not to exceed 5 years; fine not to exceed $10,000. Third Count: Imprisonment not to exceed 6 months; fine not to exceed $1,000. Fourth Count: Imprisonment not to exceed 6 months; fine not to exceed $1,000.

Bail: Kremen, $7,500; Blau, $5,000; Rasi, $10,000; Coleman, $10,000; Steinberg, $35,000.

[Endorsed]: Filed September 16, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendants above-named and each of them move the above-entitled Court for its order dismissing the indictment herein and each count thereof upon each and all of the following grounds:

First Count

I. The first count of the indictment does not state facts sufficient to constitute an offense against the United States in that, among other things:

(a) It fails to allege that Robert G. Thompson was convicted of an offense against the United States.

(b) It fails to allege that Robert G. Thompson

was committing any offense against the United States on or about the 27th day of August, 1953; and it fails to allege that Robert G. Thompson had at any time committed any of the offenses against the United States described in, or embraced within the provisions of, Title 18 U.S.C. 1073.

(c) It fails to allege facts showing how the defendants or any of them knew that Robert G. Thompson had committed an offense against the United States.

(d) It fails to allege facts showing how the defendants or any of them received, relieved, comforted, and assisted Robert G. Thompson.

(e) It fails to allege facts showing how the defendants or any of them hindered or prevented the apprehension and punishment of Robert G. Thompson.

2. The first count of the indictment is so vague and indefinite and so lacking in essential facts as to fail to advise the defendants and each of them of the nature and cause of the accusation against them and each of them in each and every of the particulars set forth above.

3. The first count of the indictment is materially at variance with the statute upon which it is purportedly based (Title 18 U.S.C. 3) in that said count fails to allege that Robert G. Thompson had committed "an offense against the United States".

4. That statute upon which the first count of the indictment is purportedly based (Title 18 U.S.C. 3) is so vague and indefinite and lacking in prior ascertainable standards of guilt as to be unconstitu-

tional on its face; furthermore, said statute, as applied to the defendants and each of them in this case, deprives them and each of them of due process of law, contrary to the Fifth and Sixth Amendments to the Constitution of the United States.

5. The statute upon which the first count of the indictment is purportedly based (Title 18 U.S.C. 3) as applied to the defendants and each of them in this case is a deprivation of the right to political association guaranteed to them and each of them by the First, Ninth and Tenth Amendments to the Constitution of the United States.

6. And for such other grounds as may appear on the face of the indictment and may be argued at the hearing on the within motion.

Second Count

1. The defendants and each of them make part hereof and incorporate herein by reference Paragraphs 1, 2, 3, 4, 5, and 6 directed to the first count of the indictment, and move that the second count of the indictment be dismissed upon each and all of the grounds set out in those paragraphs.

2. The second count of the indictment was not found within three years next after the alleged offense was committed.

Third Count

1. The third count of the indictment does not state facts sufficient to constitute an offense against the United States in that, among other things;

(a) It fails to allege that a warrant had been

issued for the arrest of said Sid Stein under the provisions of any law.

(b) It fails to allege the law, if any, pursuant to which a warrrant had been issued for the arrest of Sid Stein.

(c) It fails to allege that Sid Stein was committing any offense against the United States on or about August 27, 1953; and it fails to allege that Sid Stein had committed any of the offenses against the United States described in, or embraced within the provisions of, Title 18 U.S.C. 1073.

(d) It fails to allege facts showing how the defendants or any of them had notice and knowledge that a warrant had been issued for the arrest of Sid Stein.

(e) It fails to allege facts showing how the defendants or any of them harbored or concealed Sid Stein.

(f) It fails to allege facts showing how the defendants or any of them prevented the discovery and arrest of Sid Stein.

2. The third count of the indictment is so vague and indefinite and so lacking in essential facts as to fail to advise the defendants and each of them of the nature and cause of the accusation against them and each of them in each and every of the particulars set forth above.

3. The third count of the indictment is materially at variance with the statute upon which it is purportedly based (Title 18 U.S.C. 1071) in that said

count fails to allege that a warrant had been issued for the arrest of Sid Stein "under the provision of any law".

4. The statute upon which the third count of the indictment is purportedly based (Title 18 U.S.C. 1071) is so vague and indefinite and so lacking in prior ascertainable standards of guilt as to be unconstitutional on its face; furthermore, said statute, as applied to the defendants and each of them in this case, deprives them and each of them of due process of law, contrary to the Fifth and Sixth Amendments to the Constitution of the United States.

5. The statute upon which the third count of the indictment is purportedly based (Title 18 U.S.C. 1071) as applied to the defendants and each of them in this case is a deprivation of the right to political association guaranteed to them and each of them by the First, Ninth and Tenth Amendments to the Constitution of the United States.

6. And for such other grounds as may appear on the face of the indictment and may be argued at the hearing on the within motion.

Fourth Count

1. Defendants and each of them make part hereof and incorporate herein by reference Paragraphs 1, 2, 3, 4, 5 and 6 directed to the third count of the indictment, and move that the fourth count of the indictment be dismissed on each and all of the grounds set out in those paragraphs.

Dated: This 22nd day of October, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD

/s/ By NORMAN LEONARD,

Attorneys for Defendants

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

MOTION FOR DISCOVERY AND INSPECTION

The defendants and each of them move, pursuant to Rule 16, F.R.Crim.P., for an order directing the United States Attorney to permit the defendants and each of them, or their counsel, within ten days of said order, or in no event less than thirty days before the trial of this cause, to inspect and copy or photograph all books, papers, documents or tangible objects obtained from or belonging to the defendants and each of them, or obtained from others by seizure or by process.

Dated: This 22nd day of October, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,

/s/ By NORMAN LEONARD,

Attorneys for Defendants

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

The defendants and each of them move for an order directing the United States Attorney to furnish a bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, and within ten days after the entry of the order therefor, with respect to the following matters:

1. With respect to Count One:

(a) How or in what manner did the defendants and each of them know or obtain knowledge that Robert G. Thompson had been convicted of committing an offense against the United States.

(b) How or in what manner did the defendants and each of them receive, relieve, comfort and assist Robert G. Thompson.

(c) How or in what manner did the defendants and each of them hinder or prevent the apprehension and punishment of Robert G. Thompson.

2. With respect to Count Two:

(a) Defendants and each of them make part hereof and incorporate herein by reference Paragraphs (a), (b), and (c) directed to the first count of the indictment, and move that a bill of particulars as therein requested be also furnished respecting the same matters insofar as the second count of the indictment is concerned.

(b) How or in what manner did the overt acts alleged further the conspiracy in the said second count alleged.

3. With respect to Count Three:

(a) How or in what manner did the defendants and each of them have notice or knowledge of the fact that a warrant had been issued for the apprehension of Sid Stein.

(b) How or in what manner did the defendants and each of them harbor and conceal Sid Stein.

(c) How or in what manner did the defendants and each of them prevent the discovery and arrest of Sid Stein.

4. With respect to Count Four:

(a) Defendants and each of them make part hereof and incorporate herein by reference Paragraphs (a), (b), and (c) directed to the third count of the indictment, and move that a bill of particulars as therein requested be also furnished respecting the same matters insofar as the fourth count of the indictment is concerned.

(b) How or in what manner did the overt acts alleged further the conspiracy in the said fourth count alleged.

Dated: This 22nd day of October, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,

/s/ By NORMAN LEONARD,

Attorneys for Defendants

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

MOTION FOR THE ISSUANCE OF PRETRIAL SUBPOENA

Defendants and each of them move, pursuant to Rule 17(c), F.R.Crim.P., for the issuance by a judge of this Court of a subpoena directed to the United States Attorney commanding him within ten days of service of the said subpoena, and in no event less than thirty days before the trial of this cause, to produce for the inspection of, and copying by, defendants and each of them and their counsel, all books, papers, documents and objects (except memoranda prepared by government counsel, documents or papers solicited by or volunteered to government counsel which consist of narrative statements or memoranda of interviews), obtained by government counsel in any manner other than by seizure or process (1) in the course of the investigation by the grand jury which returned the indictment herein; and (2) in the course of the government's preparation for the trial of this cause, and if such books, papers, documents or objects (a) have been presented to the grand jury; or (b) are to be offered as evidence upon the trial of the defendants and each of them under the indictment; or (c) prove, or tend to prove, any allegation or charge in the indictment, or disprove or tend to disprove any such allegation or charge.

Dated: This 22nd day of October, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,

/s/ By NORMAN LEONARD,

Attorneys for Defendants

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR THE RETURN OF SEIZED PROPERTY

To the Plaintiff Above-named, and to Lloyd H. Burke, Esq., its Attorney:

Please Take Notice that defendants herein, through their counsel Gladstein, Andersen & Leonard, will move the above-entitled Court in the Master Calendar Department thereof, Hon. Michael J. Roche presiding, at the Post Office Building, Seventh and Mission Streets, San Francisco, California, on the 8th day of February, 1954, at the hour of 10:00 o'clock a.m. of said day or as soon thereafter as counsel may be heard, for an order directing that all clothing, books, papers, documents, or other tangible objects obtained from the possession of the defendants Shirley Kremen, Carl Edwin Rasi, Samuel Irving Coleman and Sidney Steinberg in the cabin located in the vicinity of Twain Harte, Tuolumne County, California, be re-

turned to said defendants through their attorneys herein.

This motion will be made upon the affidavit of Sidney Steinberg, defendant herein, attached hereto, and upon all of the pleadings and proceedings heretofore had herein. The ground asserted is that the above-described search and seizure without a search warrant was unreasonable, illegal and void in violation of Articles IV and V of the United States Constitution.

GLADSTEIN, ANDERSEN & LEONARD,

/s/ By RICHARD GLADSTEIN,
Attorneys for Defendants

AFFIDAVIT FOR THE RETURN OF SEIZED PROPERTY

State of California,
City and County of San Francisco—ss.

Sidney Steinberg, being first duly sworn, deposes and says:

He is a defendant in the above-entitled action and respectfully makes the within application on behalf of himself and defendants Shirley Kremen, Carl Edwin Rasi, and Samuel Irving Coleman that the property seized by certain agents of the Federal Bureau of Investigation whose true names are unknown to these defendants, in the course of a search of a certain cabin located in the vicinity of Twain Harte, Tuolumne County, California, after an ar-

rest by said agents of the defendants herein, be returned to the attorneys for defendants herein.

On the 27th day of August, 1953, affiant was arrested at the above-mentioned cabin together with all the defendants herein except defendant Patricia Janet Blau. Subsequently all the defendants herein were charged with a violation of Title 18 U.S.C. §3. All of the defendants herein, except affiant, were also charged with a violation of 18 U.S.C. §1071.

The aforesaid agents seized items including, but not limited to, clothing, books, papers, documents and other tangible objects. A few items have been returned to defendants above-named.

The property seized was in no way connected with the crime alleged in this action. The items seized were neither the instrumentalities or means by which the offenses alleged herein were allegedly committed, nor property the possession of which is criminal, nor the fruits of the offenses herein alleged.

The aforesaid search and seizure was made by certain of said agents against the will of the defendants above-named and out of their presence. No search warrant was served or displayed by the said agents.

The aforesaid search and seizure was unwarranted and illegal in that it violates the Fourth Amendment to the Constitution of the United States, and the retention of any property seized infringes upon the privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States.

Your affiant is informed and believes and therefore asserts upon such information and belief that the aforesaid agents had ample time to secure search warrants prior to the arrests made in this action, if any legal basis therefor existed.

Wherefore, affiant respectfully prays for an order that all property taken and seized from the above-named defendants as the result of the search of the aforesaid cabin by said agents be returned to the above-named defendants through their attorneys herein.

/s/ SIDNEY STEINBERG

Subscribed and sworn to before me this 3rd day of February, 1954.

[Seal] /s/ PEARL STOCKWELL,
Notary Public in and for the City and County of San Francisco, State of California.

Acknowledgment of Service attached.

[Endorsed]: Filed February 4, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR THE RETURN OF SEIZED PROPERTY AND ITS SUPPRESSION AS EVIDENCE

To the Plaintiff above-named, and to Lloyd H. Burke, its Attorney:

Please Take Notice that defendant Shirley Kremen, through her counsel, Gladstein, Andersen & Leonard, will move the above-entitled Court in the Master Calendar Department thereof, Hon. Michael J. Roche presiding, at the Post Office Building, Seventh and Mission Streets, San Francisco, California, on the 5th day of April, 1954, at the hour of 10:00 o'clock a.m. of said day or as soon thereafter as counsel may be heard, for an order directing that certain property, to-wit: all money, clothing, books, papers, documents or other tangible objects which were taken on or about the 27th day of August, 1953, from a certain residence located in the vicinity of Twain Harte, Tuolumne County, California, which said residence was then and there leased to defendant Shirley Kremen under the name of Lee Kaplan be returned to said defendant Shirley Kremen through her attorneys herein and be suppressed as evidence in this proceeding as against the defendants or any of them.

This motion will be made upon evidence to be adduced at the time of hearing on this motion, upon the memorandum of points and authorities submitted herewith, and upon all of the pleadings, rec-

ords, and files herein. The grounds asserted are that the search and seizure of the above-described property were made pursuant to an illegal arrest; against the will and without the consent of defendant Shirley Kremen or any of the above-mentioned defendants; without either a search warrant or any other authority, and were unreasonable, illegal and void in violation of Articles IV and V of the United States Constitution.

GLADSTEIN, ANDERSEN & LEONARD,
/s/ By RICHARD GLADSTEIN,
Attorneys for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed March 26, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR THE RETURN OF SEIZED PROPERTY AND ITS SUPPRESSION AS EVIDENCE

To the Plaintiff above named, and to Lloyd H. Burke, Esq., its Attorney:

Please Take Notice that defendants herein, through their counsel, Messrs. Gladstein, Andersen & Leonard, will move the above-entitled Court in the Master Calendar Department thereof, Honorable Michael J. Roche presiding, at the Post Office Building, Seventh and Mission Streets, San Fran-

cisco, California, on the 5th day of April, 1954, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel may be heard, for an order directing that all clothing, books, papers, documents, or other tangible objects obtained from the possession of defendant Patricia Julia Blau in the automobile referred to in the affidavit of said defendant Blau, attached hereto, be returned to said defendant Blau through her attorneys herein, and that said property be suppressed as evidence in any criminal proceeding.

This motion will be made upon the affidavit of Patricia Julia Blau, defendant herein, attached hereto, and upon all of the pleadings and proceedings heretofore had herein. The ground asserted is that the above-described search and seizure without a search warrant was not pursuant to a legal arrest and was unreasonable, illegal and void in violation of Articles IV and V of the United States Constitution.

GLADSTEIN, ANDERSEN & LEONARD

/s/ By RICHARD GLADSTEIN,
Attorneys for Defendants

AFFIDAVIT FOR THE RETURN OF SEIZED PROPERTY

State of California,
County of Los Angeles—ss.

Patricia Julia Blau, being first duly sworn, deposes and says:

She is a defendant in the above-entitled action and respectfully makes the within application so that the search of a certain automobile made in the above-entitled action be declared unreasonable, illegal and void, and that the United States attorney be precluded from using the evidence against affiant.

On the 27th day of August, 1953, affiant was arrested approximately eight and one-half miles south of the City of Stockton, County of San Joaquin, State of California. In connection with that arrest, affiant has been charged with violations of Title 18 U.S.C. §§ 3 and 1071.

Said arrest was made by agents of the Federal Bureau of Investigation whose true names are unknown to your affiant. Your affiant was then and there the occupant of the aforesaid automobile, which said agents searched. Said agents seized and took into their custody certain of the contents of said automobile. The aforesaid agents have not returned certain items of seized property including, but not limited to, clothing, books, papers, documents and tangible objects which the said automobile contained. No search warrant was served or displayed by the aforesaid agents making the search, and the search was conducted over the protest and against the will of affiant.

The aforesaid search and seizure was unwarranted and illegal in that it violates the Fourth Amendment to the Constitution of the United States, and the retention of any property seized infringes upon the privilege against self-incrimina-

tion as guaranteed by the Fifth Amendment to the Constitution of the United States.

Your affiant is informed and believes and therefore asserts upon such information and belief that the aforesaid agents had ample time to secure search warrants prior to the arrests made in this action, if any legal basis therefor existed.

Wherefore, affiant respectfully prays for an order that all property taken and seized from the above-named defendants as the result of the search of the aforesaid automobile by said agents be returned to affiant through her attorneys herein.

PATRICIA JULIA BLAU

Subscribed and sworn to before me this 8th day of February, 1954.

[Seal] /s/ J. ALLAN FRANKEL,
Notary Public in and for the City and County of Los Angeles, State of California.

Acknowledgment of Service attached.

[Endorsed]: Filed March 26, 1954.

[Title of District Court and Cause.]

ORDER

Defendants have petitioned the Court to order the return of property seized by United States agents while engaged in lawfully arresting defendants. The government agents conducted the search and seizure without first obtaining a search warrant. The United

States moved to have the Court strike the Motion to Return on the ground that it did not state enough facts to establish a basis for relief. Defendants' motion is supported only by one affidavit filed and signed by defendant Sidney Steinberg on behalf of himself and defendants Kremen, Rasi and Coleman. Affiant does not allege that he owned or otherwise lawfully occupied the premises searched; nor does he identify the items of property seized, if any, which he, rather than the other defendants or third parties, owned or had in his possession.

It is elementary that the Fourth Amendment may be invoked only by one whose rights are violated. Accordingly, defendant Steinberg may complain of a search and seizure only if his abode was searched and his property seized. United States vs. Jeffers, 342 U. S. 48 (1951). Moreover, the Court is unwilling to accept an affidavit made by defendant Steinberg in support of alleged Constitutional violations suffered by the other defendants.

Defendants, in support of their motion, rely strongly upon the case of United States vs. Lerner, 100 F. Supp. 765 (1951) decided by this Court. Their reliance is misplaced. That case is distinguishable. It arose on a motion to suppress certain evidence. The Court there had the benefit of testimony, rather than mere affidavits, which established that Lerner was the sole, lawful tenant of the premises searched and that the property seized was in Lerner's possession. If the search was unlawful, therefore, Lerner was the one entitled to complain.

Defendants' counsel moreover contends that the

defendants cannot make the requisite showing because the Government has in its possession the only list of property seized in the course of making the arrest. There is some merit in that contention. The Federal Bureau of Investigation, the seizing agency, made a detailed summary of the property seized. Upon the Government's admission that the summary contained no information, the divulgence of which would endanger the security of the United States, the Court is of the view that the summary should be made available to defendants in order to refresh their recollection should they choose to renew this motion buttressed by a proper showing.

The Court expresses no opinion at this juncture as to the legality of the search and seizure nor whether a Motion To Return could in a case like this be considered by the Court upon mere affidavits rather than upon evidence.

Defendants' motion is denied. The Government's motion is granted. Defendants may, upon demand, have a copy of the summarized list of items seized, consisting of twenty-five (25) pages, which was sent to the United States Attorney for the Northern District of California with a cover sheet bearing the date of February 8, 1954 and the signature of William M. Whelan, Special Agent in Charge.

So Ordered.

Dated: February 9th, 1954.

/s/ EDWARD P. MURPHY,
United States District Judge

[Endorsed]: Filed February 9, 1954.

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED INSTRUCTIONS

Defendants' Proposed Instruction No.....

Ladies and Gentlemen of the Jury:

It becomes my duty as Judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations of the indictment filed in this court and the defendants' pleas of "not guilty". This duty you should perform uninfluenced by pity for the defendants or by passion or prejudice against them. You must not suffer yourselves to be biased against the defendants because of the fact that he or she has been arrested for this offense, or because an indictment has been filed against him or her, or because he or she has been brought before the court to stand trial. None of these facts is evidence of their guilt, and you are not permitted to infer or to speculate from any or all of them that he or she is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the prosecution and the defendants have a right to demand, and they do demand and expect, that you will conscienti-

ously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, regardless of what the consequences of such verdict may be. That verdict must express the individual opinion of each juror.

CALJIC 1.

People vs. Worden, 113 Cal. 569, 45 P. 844.

People vs. Powell, 83 Cal.App. 62, 256 P. 561.

Defendants' Proposed Instruction No. . . .

You are hereby instructed that in the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed.

Thus in the crime charged in the first count of the indictment herein a necessary element is the existence in the minds of the defendants of the specific intent to hinder and prevent the apprehension and punishment of Robert G. Thompson, and unless such intent so exists, the crime so charged is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No. . . .

In this case the prosecution relies upon circumstantial evidence. I instruct you that where reliance is placed by the prosecution on circumstantial evidence, the circumstances that have been shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence, be-

fore you are permitted to convict. In other words, if after a full consideration of the evidence, you find that the circumstances relating to any particular defendant or defendants are such that they are consistent with any one or more possible and reasonable hypotheses or suppositions of innocence, then it is your duty to acquit such defendant or defendants of the charge.

Paddock vs. United States, 79 F.2d 872, 876 (CCA 9, 1935).

Defendants' Proposed Instruction No.....

Before you can find any defendant guilty you must be satisfied beyond reasonable doubt from the evidence that it has been shown that such defendant had specific knowledge of the fugitive status of any alleged fugitive, and that such person was a fugitive from federal process issued under a particular federal statute. It is not enough for the prosecution to show that the conduct or state of mind of some defendant exhibits general malevolence. Nor is it enough for the prosecution to show suspicious circumstances, or even knowledge on the part of a defendant, that the alleged fugitives were evading officers in general. Before a defendant can be convicted, it must be shown from the evidence that such defendant had knowledge that the person charged with being a fugitive was wanted by the federal authorities for the violation of some particular statute.

Fulbright vs. United States, 91 F.2d 210 (CCA 8, 1937).

Defendants' Proposed Instruction No.....

I instruct you that the words "harbor" or "conceal" are active verbs which have the fugitive as their object. Passive conduct on the part of any defendant would therefore not measure up to the requirement of harboring or concealing.

Also, not every piece of active conduct on the part of a defendant in relationship to an alleged fugitive would constitute harboring or concealing. In other words, the law involved in this case does not prohibit every form of assistance to a fugitive. Being in the fugitive's presence, or indeed giving him various forms of assistance, would by themselves not constitute a violation of the law. For example, making a payment of money to a fugitive, which is to be used by the fugitive in any way which he may choose, does not constitute a concealment or harboring within the meaning of the statute.

United States vs. Shapiro, 113 F.2d 891 (CCA 2, 1940).

Defendants' Proposed Instruction No.....

Under the statute here involved, it is not a criminal offense for a defendant to remain silent after knowledge of the commission of the crime of a fugitive. The defendants are not being charged, and it would not be proper for you to find them guilty, of a failure to report or denounce any alleged fugitive. Before any of them can be found guilty in this case, you must find in accordanee with my instructions and based upon the evidence, that some af-

firmative act or acts were committed toward the concealment of the alleged offender.

United States vs. Farrar, 38 F.2d 515 (DC Mass., 1930).

Defendants' Proposed Instruction No.....

Under the law involved in this case, an accessory after the fact is a person who, knowing that a criminal offense has been committed, receives, relieves, comforts or assists the guilty person in order to hinder his apprehension, trial or punishment. However, I charge you that this statute defining accessory after the fact is not the same as the statute on harboring and concealment, and that the two offenses are separate and distinct. In the case of accessories after the fact, the acts of Robert Thompson, alleged to be the principal, in committing the substantive offense alleged in this case, and the acts of an accessory after the fact thereto, are one continuous criminal transaction. Therefore the acts of the two—that is the principal and the accessory, constitute a single offense committed by them jointly, one acting as principal and the other as accessory after the fact.

If therefore, you find that any defendant has not conducted himself in such a manner as to participate with Robert Thompson in the commission of the substantive offense of which he was charged and convicted, then you may not find such defendant guilty of being an accessory after the fact thereto.

Skelly vs. United States, 76 F.2d 483 (CCA 10, 1935).

Defendants' Proposed Instruction No.....

In order to make out the offense of harboring, as that term is used in this statute, it is necessary that the person charged be shown to have provided shelter or other assistance in a clandestine manner, and with the intent and for the purpose stated to you.

In order to make out a case of concealment, as that term is used in the statute, it is necessary for the prosecution to prove conduct on the part of a defendant that shows that such defendant tried to shield the alleged fugitive from observation and to prevent the discovery of such fugitive.

Susnjar vs. United States, 27 F.2d 223 (CCA 6, 1928).

Defendants' Proposed Instruction No.....

I instruct you that the mere act of giving shelter to a fugitive does not in and of itself constitute a concealment or harboring in violation of the law, unless the person providing the shelter has knowledge of the fugitive status of the fugitive, and participates in conduct that shows surreptitious concealment of the fugitive.

United States vs. Mack, 112 F.2d 290 (CCA 2, 1940).

Defendants' Proposed Instruction No.....

To harbor or conceal a fugitive in violation of the statute, the act or acts done must evince an intention to elude the vigilance of the law or its agents, and the act done must be calculated to attain that object. Merely to relieve the hunger of a fugitive

would not constitute a violation of the statute, unless accompanied by acts showing a determination to disregard the law in the manner I have outlined to you. Treating a fugitive on the ordinary principles of humanity, such as conversing with him or relieving his hunger or thirst, or in administering to his comfort, does not in and of itself constitute a violation of law. It is only when such conduct, taken with other evidence and all of the circumstances of the case, are so marked in character as to show both an intention to elude the vigilance of the law and a calculation to attain such an object, that a concealment or harboring may be found in violation of the statute.

Jones vs. Van Zandt, 13 F.Cas. 1040, 1043, 1044, No. 7501.

Defendants' Proposed Instruction No.....

I have instructed you that it is necessary, before you can find any defendant guilty of the charge of conspiracy, that the prosecution shall have proved to your satisfaction and beyond reasonable doubt that at least one overt act was committed which was in furtherance of the alleged conspiracy. An overt act which is not in furtherance of the alleged conspiracy will not support a conviction. In other words, before a conspiracy can be supported by any evidence of overt act, it must be shown to you that such overt act was such as to convince you that it was intended and calculated by such overt act to elude the vigilance of the law.

Jones vs. Van Zandt, 46 U.S. 215.

Defendants' Proposed Instruction No.....

As used in the statutes involved in this case, the word "conceal" means to hide, to secrete, or to keep out of sight. Therefore, the mere presence of a fugitive in one's home, or the mere association between a defendant and a fugitive, does not constitute concealment, unless you find from the evidence that such defendant engaged in conduct constituting a hiding or secreting of the fugitive, or keeping him out of sight.

The word "harbor" as used in the statute involved in this case means to give lodging and care to a fugitive after secreting him. In other words, some physical act tending to the secretion of the body of the fugitive is essential before the offense of harboring or concealment can be made out.

It is also necessary that it be shown that such acts of concealment or harboring, if any you find, were committed knowingly and wilfully for the purpose of bringing about such concealment, with the intent to shield the fugitive from the law, and only after knowledge of the existence of the person concealed as a fugitive from justice.

Firpo vs. United States, 261 U.S. 850, (CCA 2, 1919).

Defendants' Proposed Instruction No.....

Like every other case tried in a court of justice, this one should be decided according to the law and the evidence. It cannot be disguised that the subject of Communism is at this time a fruitful source of public agitation. Indeed, it has become a chief ele-

ment of political excitement in our country. Whatever may be your individual views of this subject, it is clear that you will best acquit yourselves of the responsibility now resting upon you, by taking care that the rights of the parties to this action are in no way affected by the existing state of public feeling on the question of Communism.

Driskill vs. Parrish, 7 F.Cas. 1100, No. 4089.

Defendants' Proposed Instruction No.....

I instruct you that the statutes involved in this case do not impose any obligation on any person whatever to aid or assist in the capture of a fugitive.

Driskill vs. Parrish, 7 F.Cas. 1095, No. 4088.

Defendants' Proposed Instruction No.....

To establish the charge of harboring and concealing against any particular defendant there must be satisfactory proof that he or she, with full knowledge that the person or persons harbored were fugitives, concealed them with the intent to elude the vigilance of the law and to defeat the law's claim.

Driskill vs. Parrish, 7 F.Cas. 1093, No. 4087.

Defendants' Proposed Instruction No.....

I instruct you that mere association with a conspirator or conspirators in matters not connected with the unlawful undertaking charged in the indictment does not make such a person a conspirator, even though he or she may know that an unlawful

undertaking is in the making with those with whom he associates. The crime of conspiracy requires that two or more persons combine or confederate with each other for the particular purpose of committing a public offense. Therefore mere association between a defendant and a conspirator does not make such defendant guilty, even though such defendant knows that the conspirator is engaged in unlawful activities. It is only when a defendant associates with a conspirator for the purpose of committing a public offense, and engages in conduct calculated to achieve an unlawful objective, that such a defendant may be found guilty of the offense of conspiracy.

Butler vs. United States, 197 F.2d 561, 564 (CCA 10, 1952).

Defendants' Proposed Instruction No.....

The word "knowingly," as used in my instructions, imports only a knowledge of the existence of the facts in question, when those facts are such as bring the act or omission within the provision of the law. The word does not require in its meaning any knowledge of the unlawfulness of such act or omission.

CALJIC 76.

Defendants' Proposed Instruction No.....

In this case, you must decide separately the question of the innocence or guilt of each of the several defendants. If you cannot agree upon the innocence or guilt of all the defendants, but do agree as to the innocence or guilt of one or more of them, you must

render a verdict as to the one or more upon whose innocence or guilt you do agree.

CALJIC 93.

Defendants' Proposed Instruction No.....

Each count set forth in the indictment charges a separate and distinct offense. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendant. He may be convicted or acquitted upon any or all of the offenses charged, depending upon the evidence and the weight you give to it, under the court's instructions.

CALJIC 112.

Defendants' Proposed Instruction No.....

The word "wilfully", when applied to the intent with which an act is done or omitted and as used in my instructions, implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage.

CALJIC 75.

People vs. O'Brien, 96 Cal. 171, 176, 31 P. 45, 46, 47.

People vs. Settles, 29 Cal.App. 2d 781, 785, 78 P.2d 274, 276.

Green vs. Stewart, 106 Cal.App. 518, 528, 289 P. 940, 944.

People vs. Westmire, 71 A.C.A. 573, 162 P.2d 988.

Defendants' Proposed Instruction No.....

In every crime or public offense there must exist a union or joint operation of act and intent. To constitute criminal intent it is merely necessary that a person intend to do an act which, if committed, will constitute a crime. When a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive.

CALJIC 71.

People vs. McClennegen, 195 Cal. 445, 234 P. 91.

People vs. Gonzales, 74 Cal.App. 341, 240 P. 291.

People vs. Womble, 67 Cal.App. 2d 885, 155 P.2d 838.

Defendants' Proposed Instruction No.....

Duly qualified experts may give their opinions on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard

any such opinion, if you find it to be unreasonable.

CALJIC 56.

People vs. Williamson, 134 Cal.App. 775, 780, 26 P.2d 681, 683.

People vs. Brac, 73 A.C.A. 711, 167 P.2d 535.

Defendants' Proposed Instruction No.....

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

CALJIC 53.

Huddy vs. Chronicle Publishing Co., 15 Cal. 2d 554, 103 P.2d 421.

Defendants' Proposed Instruction No.....

You are the exclusive judges of the credibility of the witnesses. A witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence; by the manner of the

witness on the stand, the degree of intelligence exhibited by him, and the manner in which he testifies; by the character of his testimony; by evidence showing his motives, an interest in the outcome of the case, or bias or prejudice against one of the parties; by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony.

CALJIC 52.

People vs. Amaya, 134 Cal. 531, 539, 66 P. 694, 797.

Defendants' Proposed Instruction No.....

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus whether or not he does testify rests entirely in his own decision. In deciding whether or not to testify the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the prosecution to prove every essential element of the charge against him, and no lack of testimony on the defendant's part will supply a failure of proof by the prosecution so as to support by itself a finding against him on any such essential element. The failure of a defendant to deny or explain evidence against him does not create any presumption of guilt, and it does not by itself warrant any inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime, and the guilt of the defendant beyond a reasonable doubt.

Defendants' Proposed Instruction No.....

In the trial of this case there were instances when certain evidence was admitted as against one or more of the defendants, but denied admission as against others; and there were instances when certain evidence was admitted in favor of one or more of the defendants, but denied admission in favor of others.

It may be difficult for you, when considering the case for or against any one certain defendant, to disregard completely any evidence that was admitted only as to another, but that is your plain duty with respect to evidence not admitted by the Court as against or in favor of a certain defendant, and you must try conscientiously to so treat such a situation.

CALJIC 39.

Defendants' Proposed Instruction No.....

I instruct you further that you are not permitted, on circumstantial evidence alone, to find the defendants guilty of any crime charged against them unless the proved circumstances not only are consistent with the hypothesis that the defendants are guilty of the crime, but are irreconcilable with any other rational conclusion. In other words, if, on your consideration of the entire case the evidence is consistent with the hypothesis that any one or more of the defendants was innocent of any of the offenses charged against him or her, your verdict should be in favor of such defendant or defendants

as to each and every count concerning which you reach that conclusion.

CALJIC 29, as modified.

Defendants' Proposed Instruction No. . . .

If the evidence in this case as to any particular count is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendants, and the other to their innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendants' innocence, and reject that which points to his or her guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to a defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

CALJIC 26.

People vs. Clark, 145 Cal. 727, 728, 79 P. 434.

People vs. Newland, 15 Cal. 2d 678, 104 P.2d 778.

People vs. Ratterman, 38 Cal.App. 2d 598, 600, 101 P.2d 750, 751.

People vs. Hatchett, 63 Cal.App. 2d 144, 146 P.2d 469.

People vs. Nunn, 65 Cal.App. 2d 188, 150 P.2d 476.

People vs. Rayol, 65 Cal.App. 2d 462, 150 P.2d 812.

People vs. Blanks, 67 Cal.App. 2d 132, 153 P.2d 449.

Defendants' Proposed Instruction No.....

Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as exhibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence.

CALJIC 23.

People vs. Powell, 83 Cal.App. 62, 67, 68, 256 P. 561, 563, 564.

Defendants' Proposed Instruction No.....

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. However, the effect of this presumption is only to place upon the prosecution the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human af-

fairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

CALJIC 21.

People vs. McEvers, 53 Cal.App. 2d 448, 128 P.2d 93.

People vs. Matthai, 135 Cal. 442, 67 P. 694.

People vs. Soldavini, 45 Cal.App. 2d 460, 114 P.2d 415.

Defendants' Proposed Instruction No.....

The Court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the Court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

CALJIC 8.

People vs. Clark, 70 Cal.App. 531, 233 P. 980.

People vs. Casey, 79 Cal.App. 295, 249 P. 525, rehearing denied 250 P. 653.

Defendants' Proposed Instruction No.....

I instruct you that in the case involving Robert Thompson in which he was convicted of a violation of the Smith Act, he was neither charged with nor convicted of any attempt to overthrow the government of the United States, nor of conspiring to do so. Neither was he charged with nor convicted of any overt act designed to overthrow the government of the United States, or conspiring to do so. Furthermore, he was not charged with saying anything or writing anything designed or calculated to overthrow the government. The charge against him is that he conspired with others to assemble and to talk and to publish certain ideas at a later date, which ideas would constitute an advocacy of the overthrow of the government.

I tell you these things in order to make clear to you what is involving in the charges contained in the first and second counts, relating to accessories after the fact. Before any defendant in this case can be convicted, under either the first or second count, you must be satisfied beyond a reasonable doubt from all the evidence, that such defendant or defendants conducted themselves in such manner as to become actual parties to the specific offense of which Thompson was convicted.

United States vs. Dennis, opinion of Justice Black, 339 U.S. 162, 175.

Skelly vs. United States (CCA 10), 76 F.2d 483.

Defendants' Proposed Instruction No.....

The knowledge charged in this indictment is not that the defendants had knowledge that Robert Thompson had been convicted of an offense, but that they had knowledge that he actually had committed the offense of conspiracy to violate the Smith Act. I instruct you that unless the prosecution proves that a particular defendant knew that Thompson had actually committed the offense for which he was tried, then the requirement of the statute has not been made out. In other words, it is not enough to show that a defendant had knowledge that Thompson was convicted, for this is not the same as knowledge that Thompson was guilty. It is true that when person is convicted, an inference may be drawn that he was guilty, but this does not necessarily follow. A person may in good faith believe that another has been unjustly convicted, and that the person convicted was actually innocent of the charge on which he was tried.

If, therefore, you find from the evidence in the case of any particular defendant or defendants, that the prosecution has not satisfied you beyond a reasonable doubt that such defendant or defendants knew, not merely that Thompson had been convicted, but that he was guilty of the offense charged against him, then a case has not been made out against such defendant or defendants.

Defendants' Proposed Instruction No.....

Concealing means the taking of active steps by the defendant to hide a fugitive from the police.

Harboring means caring for him after such concealment. Mere association with a fugutive, knowledge of his whereabouts, and failing or refusing to disclose this information, is not a violation of law.

In addition, it must be the defendant, not the fugitive, who does the concealing, and the concealing must be something more than the mere failure to reveal. In other words, if you find that a fugitive committed the acts of concealment or hiding, but that a defendant did not, the offense would not be made out against such defendant.

I also instruct you that mere knowledge that a person concealed is a so-called fugitive is not in and of itself enough. Before you can convict a defendant it is necessary to establish that he had notice or knowledge that a federal warrant for the arrest of the so-called fugitive had been issued.

Defendants' Proposed Instruction No.....

"Circumstantial evidence is equally available with direct evidence to prove the conspiracy, but suspicion or conjecture cannot take the place of evidence. Guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had. Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful

agreement and participation therein, with knowledge of the agreement.

"Presumption cannot be based upon another presumption, but only upon facts. It is not necessary that all of the alleged conspirators should have been such from the beginning of the conspiracy. There may be a subsequent joining; but a person, to be held as subsequently joining a conspiracy, must be shown to have had knowledge of the conspiracy at the time of joining, and to have participated while having such knowledge."

Dahly vs. United States (CCA 8), 50 F.2d 37, 42.

Defendants' Proposed Instruction No.....

On the other hand, your own authority to judge the evidence and to determine the facts in the case has this limitation: it is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

CALJIC 7-A.

Defendants' Proposed Instruction No.....

(Requested to be given only in the event that the Court comments upon the evidence, and then, if agreeable to the Court, this instruction to be given at the conclusion of the Court's comment on the evidence.)

As Judge of this Court, presiding at the trial of this action, I am authorized within proper bounds to comment to the jury on the credibility of any

witness and on any other phase of the evidence.

Under that authority, and with a view to aiding you in determining the facts, I have made certain statements concerning the evidence in this case.

However, I instruct you that the jury are the sole and exclusive judges of all questions of fact and of the credibility of each and every witness, and you are not to consider any comment which I have made on the evidence as binding upon you, or necessarily to be followed by you. I caution you that it is your right and duty to exercise the same independence of judgment in weighing my comment on the evidence as you are entitled to exercise in weighing the testimony of witnesses and the arguments of counsel. As Judge of this Court, I do not intend, nor desire, that my judgment shall be substituted for the judgment of the jury. My sole purpose in commenting on the evidence has been to express my personal thought on these matters for the sole purpose of assisting you in arriving at a verdict, but I particularly caution you that any such thought expressed by me shall not be used for the purpose of imposing my will upon you, or for the purpose of compelling a verdict. Your verdict should reflect your own sound judgment, and not that of the Court or myself as Judge thereof.

Accordingly, in the exercise of your own sound judgment, you are at liberty to disagree with any comment I have made upon the evidence, and to disregard such comment if you so see fit.

CALJIC 7, as modified.

People vs. Gosden, 6 Cal. 2d 14, 32.

Defendants' Proposed Instruction No.....

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered in evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

CALJIC 6.

Defendants' Proposed Instruction No.....

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

CALJIC 5.

Defendants' Proposed Instruction No.....

You are the exclusive judges of the facts and of the effect and value of the evidence, but you must determine the facts from the evidence produced here in court. If any evidence was admitted and afterwards was ordered by me to be stricken out, you must disregard entirely the matter thus stricken, and if any counsel intimated by any of his questions that certain hinted facts were, or were not, true, you must disregard any such intimation, and must not draw any inference from it. As to any statement made by counsel in your presence concerning the facts in the case, you must not regard such a statement as evidence; provided, however, that if counsel for all parties have stipulated to any fact, you are to regard that fact as being conclusively proved; and if, in the trial, any party has admitted a fact to be true, such admission may be considered by you as evidence in the case.

CALJIC 2.

Defendants' Proposed Instruction No.....

Each defendant in this case is individually entitled to, and must receive, your determination whether or not he was a member of the alleged conspiracy, if any existed, and as to each defendant you must determine whether or not he was a conspirator, as alleged, by deciding whether or not he wilfully, intentionally and knowingly joined with any other or others in an agreement or understanding having the elements of a criminal conspiracy as I have stated them to you.

CALJIC 944.

Defendants' Proposed Instruction No.....

No act or declaration of a conspirator that is a fresh and independent product of his own mind and is outside the common design and not in furtherance of that design, is binding upon his co-conspirators, and they are not criminally liable for any such act or declaration.

CALJIC 943.

People vs. Werner, 16 Cal.2d 216, 105 P.2d 927.

People vs. Creeks, 170 Cal. 368, 149 P. 821.

People vs. Kauffman, 152 Cal. 331, 92 P. 861.

People vs. Smith, 151 Cal. 619, 91 P. 511.

People vs. Suter, 43 Cal.App. 2d 444, 111 P.2d 23.

People vs. Little, 41 Cal.App. 2d 797, 107 P.2d 634, 108 P.2d 63.

People vs. DiDonato, 90 Cal.App. 366, 265 P. 978.

Defendants' Proposed Instruction No.....

Evidence that a defendant was in the company of or associated with one or more other persons alleged or proved to have been members of a criminal conspiracy is not, in itself, sufficient to prove that such defendant was a member of the alleged conspiracy.

CALJIC 937-A.

Defendants' Proposed Instruction No.....

Neither the members of a conspiracy, if one existed, nor the persons charged with having belonged

to a conspiracy are bound by or liable for any act or declaration of a person who was not a member of the conspiracy, although the latter person may have performed an act or acts which tended to promote the object of the alleged conspiracy. Evidence of an act which furthered the execution of the design of an alleged conspiracy is not, in itself, sufficient to prove that the person committing the act was a member of such a conspiracy. Neither is evidence that such person or any person was in the company of or associated with one or more alleged conspirators, in itself, sufficient to prove that he was a member of the alleged conspiracy.

CALJIC 937.

People vs. Armentrout, 118 Cal.App.Supp. 761, 1 P.2d 556.

People vs. Yant, 26 Cal.App. 2d 725, 80 P.2d 506.

People vs. Weber, 7 Cal.App. 2d 620, 46 P.2d 222.

Defendants' Proposed Instruction No. . . .

Where a conspirator commits an act which is neither in furtherance of the object of the conspiracy nor the natural and probable consequence of an attempt to attain that object, he alone is responsible for and is bound by that act, and no responsibility therefor attaches to any of his confederates.

CALJIC 936.

People vs. Little, 41 Cal.App. 2d 797, 107 P.2d 634, 108 P.2d 63.

People vs. Gilliland, 39 Cal.App. 2d 250, 103 P.2d 179.

Defendants' Proposed Instruction No.....

No evidence of an act or declaration of an alleged conspirator shall be binding upon or considered against any other alleged conspirator unless and until, independent and without the aid of such evidence, a conspiracy as alleged, and of which both such persons were members, has been proved to have been in existence at the time of such act or declaration; and no alleged conspirator shall be held criminally responsible as such for any act of another alleged conspirator when the only substantial evidence purporting to indicate an agreement between them is evidence of the acts and declarations of the latter.

CALJIC 935.

People vs. Marvin, 48 Cal.App. 2d 180, 119 P.2d 413.

People vs. MacPhee, 26 Cal.App. 218, 146 P. 522.

Defendants' Proposed Instruction No.....

You are hereby instructed that with respect to the crime of conspiring to harbor and conceal Sidney Steinberg as charged in the fourth count of the indictment herein, a necessary element is the existence in the minds of the defendants of the specific intent to prevent the discovery and arrest of Sidney Steinberg, and unless such intent so exists, that crime is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.....

You are hereby instructed that with respect to the harboring and concealing crime charged in the third count of the indictment, a necessary element is the existence in the minds of the defendants of the specific intent to prevent the discovery and arrest of Sidney Steinberg, and unless such intent so exists that crime is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.....

In the crime charged in the second count of the indictment herein alleging a conspiracy on the part of the defendants to violate Section 3 of Title 18 of the United States Code, by receiving, relieving, comforting and assisting Robert G. Thompson, a necessary element is the existence in the minds of the defendants of the specific intent to hinder and prevent the apprehension and punishment of Robert G. Thompson, and unless such intent so exists that crime is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.....

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to

recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates, but rather judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the Court reminds you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

CALJIC 4.

People vs. Selby, 198 Cal. 426, 439, 245 P. 426, 432.

Defendants' Proposed Instruction No.....

The prosecution and the defendants all are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of each of the defendants. When you have reached a conclusion in that respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon

that original opinion and render his verdict according to his final decision.

CALJIC 3.

Defendants' Proposed Instruction No.....

I instruct you that the offense of harboring and concealing a fugitive from justice is a lesser offense than, and included within, the offense of being an accessory after the fact. If, therefore, you find from all the evidence that the defendants or any of them engaged in conduct amounting to the harboring and concealing of Robert Thompson, for the purpose of preventing his apprehension or arrest, and at the same time if you also find that such defendants or any of them did not engage in activity making them accessories after the fact of the offense for which Thompson was tried and convicted in New York, then you should find such defendants, if any, guilty of harboring and concealing Thompson, and you should return a verdict of not guilty as to any such defendants in regard to the charge of being an accessory after the fact.

I further charge you that conspiracy to commit the substantive offense of harboring and concealing is likewise included within, and constitutes a lesser offense than, the charge of conspiracy to commit the substantive crime of accessory after the fact. Therefore, if you find from the evidence that the defendants or any of them engaged in conduct amounting to conspiracy to harbor and conceal Thompson, but not amounting to conspiracy to be and become accessories after the fact, you are at liberty to find

such defendants, if any, guilty of conspiracy to harbor and conceal Thompson, but you should return a verdict of not guilty as to any such defendants in regard to the charge of conspiracy to be and become accessories after the fact.

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Shirley Kremen, also known as Lee Kaplan, the defendant at the bar,

Guilty as to Count One.
Guilty as to Count Two.
Guilty as to Count Three.
Guilty as to Count Four.

/s/ EUGENE E. MARSHALL,
Foreman

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Carl Ross, also known as Carl Edwin Rasi, and Robert Edward Newman, the defendant at the bar,

Guilty as to Count One.
Guilty as to Court Two.
Guilty as to Count Three.

Guilty as to Count Four.

/s/ EUGENE E. MARSHALL,
Foreman

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Samuel Irving Coleman, also known as William B. Gordon, the defendant at the bar,

Guilty as to Count One.
Guilty as to Count Two.
Guilty as to Count Three.
Guilty as to Count Four.

/s/ EUGENE E. MARSHALL,
Foreman

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Sidney Steinberg, also known as Sid Stein, and Joshua Newberg, the defendant at the bar,

Guilty as to Count One.
Guilty as to Count Two.

/s/ EUGENE E. MARSHALL,
Foreman

[Endorsed]: Filed April 26, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA,

vs.

SHIRLEY KREMEN, also known as LEE KAPLAN

JUDGMENT AND COMMITMENT

On this 3rd day of May, 1954 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon her plea of Not Guilty and a Verdict of Guilty of the offense of following violations:

Count 1. Viol. 18 USC 3—Accessory after the fact.

Count 2: Viol. 18 USC 371—Conspiracy to viol. Sec. 3, 18 USC.

Count 3: Viol. 18 USC 1071—Harboring.

Count 4: Viol. 18 USC 371—Conspiracy to viol. Sec. 1071, 18 USC.

(Defts. named in indt. did receive and assist Robert G. Thompson in order to hinder and prevent his apprehension and punishment; defts. knew he had been convicted in U. S. Dist. Ct., S.D.N.Y. for viol. §§ 2, 3, 5 of Act of June 28, 1940—Smith Act. Said defts. did harbor Sid Stein, alias Sidney Steinberg; defts. had notice and knowledge that warrant for his arrest had been issued in U. S. Dist. Ct., S.D.N.Y. Said defts. unlawfully did conspire with

each other, with Robert G. Thompson, a co-conspirator, and with divers other persons unknown. In pursuance of the conspiracy and to effect object thereof in the Nor. Dist. of Calif. and elsewhere one or more of defts. herein did further said conspiracy by committing certain overt acts, etc. Offenses committed on or about Aug. 27, 1953, in vicinity of Twain Harte, Tuolumne Co., Calif.), as charged said Cts. 1, 2, 3, 4 of indictment; and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of—

Count One—One (1) Year.

Count Two—One (1) Year.

Ordered that said terms of imprisonment imposed on Counts One and Two commence and run Concurrently.

Count Three—Six (6) Months.

Count Four—Six (6) Months.

Ordered that said terms of imprisonment imposed on Counts Three and Four commence and run Concurrently with one another, and commence and run Concurrently with term of imprisonment imposed on Count One.

Total Imprisonment—One (1) Year.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Judgment and Commitment filed this 5th day of May, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA

vs.

CARL ROSS, alias CARL EDWIN RASI, alias ROBERT EDWARD NEWMAN

JUDGMENT AND COMMITMENT

On this third day of May, 1954 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of following violations:

Count 1: Viol. 18 USC 3—Accessory after the fact.

Count 2: Viol. 18 USC 371—Conspiracy to viol. Sec. 3, 18 USC.

Count 3: Viol. 18 USC 1071—Harboring.

Count 4: Viol. 18 USC 371—Conspiracy to viol. Sec. 1071, 18 USC.

(Defts. named in indictment did receive and assist Robert G. Thompson in order to hinder and prevent his apprehension and punishment; defts. knew he had been convicted in U. S. Dist. Ct., S.D.N.Y. for viol. §§ 2, 3, 5 of Act of June 28, 1940 —Smith Act. Said defts. did harbor Sid Stein, alias Sidney Steinberg; defts. had notice and knowledge that warrant for his arrest had been issued in U. S. Dist. Ct., S.D.N.Y. Said defts. unlawfully did conspire with each other, with Robert G. Thompson, a co-conspirator, and with divers other persons unknown. In pursuance of the conspiracy and to effect object thereof in the Nor. Dist. of Calif. and elsewhere, one or more of defts. herein did further said conspiracy by committing certain overt acts, etc. Offenses committed on or about August 27, 1953 in vicinity of Twain Harte, Tuolumne Co., Calif.), as charged said Cts. 1, 2, 3, 4 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of—

Count One—One (1) Year.

Count Two—One (1) Year.

Ordered that said terms of imprisonment imposed on Counts One and Two commence and run Concurrently.

Count Three—Six (6) Months.

Ordered that said term of imprisonment imposed on Count Three commence and run from and after the Expiration of term of imprisonment imposed on Counts One and Two.

Count Four—Six (6) Months.

Ordered that said term of imprisonment imposed on Count Four commence and run from and after the Expiration of term of imprisonment imposed on Count Three.

Total Imprisonment—Two (2) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Judgment and Commitment filed this 5th day of May, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA

vs.

SAMUEL IRVING COLEMAN, also known as WILLIAM B. GORDON

JUDGMENT AND COMMITMENT

On this 3rd day of May, 1954 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of following violations:

Count 1: Viol. 18 USC 3—Accessory after the fact.

Count 2: Viol. 18 USC 371—Conspiracy to viol. Sec. 3, 18 USC.

Count 3: Viol. 18 USC 1071—Harboring.

Count 4: Viol. 18 USC 371—Conspirary to viol. Sec. 1071, 18 USC.

(Defts. named in indt. did receive and assist Robert G. Thompson in order to hinder and prevent his apprehension and punishment; defts. knew he had been convicted in U. S. Dist. Ct., S.D.N.Y. for viol. §§ 2, 3, 5 of Act of June 28, 1940—Smith Act. Said defts. did harbor Sid Stein, alias Sidney Steinberg: defts. had notice and knowledge that warrant for his arrest had been issued in U. S. Dist. Ct., S.D.N.Y. Said defts. unlawfully did conspire with

each other, with Robert G. Thompson, a co-conspirator, and with divers other persons unknown. In pursuance of the conspiracy and to effect object thereof in the Nor. Dist. of Calif. and elsewhere, one or more of defts. herein did further said conspiracy by committing certain overt acts, etc. Offenses committed on or about August 27, 1953, in vicinity of Twain Harte, Tuolumne County, Calif.), as charged said Cts. 1, 2, 3, 4 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of—

Count One—One (1) Year.

Count Two—One (1) Year.

Ordered that said term of imprisonment imposed on Count Two commence and run from and after Expiration of term of imprisonment imposed on Count One.

Count Three—Six (6) Months.

Ordered that said term of imprisonment imposed on Count Three commence and run from and after Expiration of term of imprisonment imposed on Count Two.

Count Four—Six (6) Months.

Ordered that said term of imprisonment imposed

on Count Four commence and run from and after Expiration of term of imprisonment imposed on Count Three.

Total Imprisonment—Three (3) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Judgment and Commitment filed this 5th day of May, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA

vs.

SIDNEY STEINBERG, alias SID STEIN and JOSHUA NEWBERG

JUDGMENT AND COMMITMENT

On this 3rd day of May, 1954 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been con-

victed upon his plea of Not Guilty and a Verdict of Guilty of the offense of following violations:

Count 1: Viol. 18 USC 3—Accessory after the fact. On or about Aug. 27, 1953 in Nor. Dist. of Calif., in vicinity of Twain Harte, Calif., defts. Sidney Steinberg, et al., did receive, relieve, comfort and assist Robert G. Thompson in order to hinder and prevent his apprehension and punishment. Defts. knew he had been convicted in U. S. Dist. Ct., S.D.N.Y. for viol. Secs. 2, 3, 5 of Act of June 28, 1940, Smith Act.

Count 2: Viol. 18 USC 371—Conspiracy to viol. Sec. 3, Title 18 USC. At a time and place unknown, in Nor. Dist. of Calif. and elsewhere, defts. Sidney Steinberg, et al., unlawfully conspired with each other and with divers other persons unknown. Object of said conspiracy was to receive, etc., said Robert G. Thompson as aforesaid. Defts. well knew he had violated Secs. 2, 3, 5 of Act of June 28, 1940, Smith Act. In pursuance of said conspiracy and to effect object thereof, deft. Sidney Steinberg, while using name of Joshua Newberg, committed certain overt acts on or about Aug. 1, 1953 and certain other dates, in vicinity of Twain Harte, Calif., as charged said Counts 1 and 2 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of—

Count One—Two (2) Years.
Count Two—One (1) Year.

Ordered that said term of imprisonment imposed on Count Two of indictment commence and run from and after the expiration of imprisonment imposed on Count One.

Total Imprisonment—Three (3) Years.

(Indictment contains four counts. Defendant not named in Counts 3 and 4.)

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Judgment and Commitment filed this 5th day of May, 1954.

[Title of District Court and Cause.]

EXCERPTS FROM DOCKET ENTRIES

1953

Nov. 10—Deft. pleaded not guilty, ord. contd. to Nov. 27 hrg. mos. to be set. as to deft. Sidney Steinberg. Defts. Coleman, Blau, Ross, Kremen, pleaded not guilty, Ord. contd. to Nov. 27 for Hrg. on Mos. and to be set.

Nov. 27—Motions to Dism. and for B/Ps, Denied; motions for discovery and inspection and for subpoena, Denied, without prejudice; Fur. Ord. case contd. to Dec. 11th to be set. (Applicable to all 5 defts. in this

1954 case.)

Feb. 8—Mr. Schnacke made a motion to strike the defts. motion for return of seized property; evid. was introd. on behalf of the deft. After hrg. Mr. Gladstein the motion was ordered submitted and contd. to Feb. 9, 1954 at 10:00 a.m. for ruling on Motions to dismiss and motion for production of list of seized articles. (Heard by Judge Murphy.)

Feb. 9—Deft's motion for return of seized property is denied, and the government's motion is Granted; Fur. Ord. that the Defts may upon demand have a summarized list of seized property. 48 Filed Order denying deft. Sidney Steinberg, Kremen, Ross and Coleman's motion for return of seized property.

1954

Apr. 5—Hrg. on Mo. to return seized property. Ord. cont'd to Apr. 6 for further hrg. (Goodman.)

Apr. 6—By Stip. of counsel Ord. Mos. off Cal.

Apr. 12—Ordered case assigned to Judge Goodman, for trial. Trial Begun, jury impaneled (with Alternate Jurors). Motion for a mis-trial and for judgment of acquittal Denied. Motion on ground of surprise, for fair adjournment to prepare further defense, Denied. Motion by Mr. Gladstein and Mr. Leonard to withdraw as counsel for Steinberg, Granted. Defendant, Steinberg to appear on his own behalf. Motion by Mr. Gladstein that defendant, Julia Blau, be furnished reporter's daily transcript at Government's expense, taken under submission. Evid. introduced and case contd. to April 13, 1954 at 10:30 a.m. for further trial.

Apr. 13—Further Hrg. on motions to suppress evid. and to return seized property. After argument, ea. of said mos. was ord. Denied. Trial resumed, Mo. of deft., Blau, for copy of reporter's daily transcript at Government expense, heretofore submitted, ordered Denied. Cont'd to Apr. 14, 1954 for fur. trial.

Apr. 14—Trial resumed, Evid. introd. ord. contd. to Apr. 15 for fur. trial.

1954

Apr. 15—Trial resumed, evid. introd. Motion by Norman Leonard for a mis-trial was Denied, Ord. contd. to Apr. 16th for fur. trial.

Apr. 16—Trial resumed, evid. introd., ord. contd. to Apr. 19th for trial.

Apr. 19—Trial resumed, evid. introd. Motion made by Norman Leonard, Esq., for a mis-trial, was denied, Motion made by Mr. Gladstein, Esq., for striking the testimony of Henry Capozzi was Granted. Ord. this case contd. to Apr. 20th for further trial.

Apr. 20—Trial resumed, Motions by defense counsel to strike the testimony of Philip J. Moody, Andrew M. Price, and part of the testimony of Harry L. Sotzen were denied; Motions to strike the testimony of Robert Darden and Robert Munger were granted; a motion by Norman Leonard for a mis-trial was denied, case contd. to April 21st for fur. trial.

Apr. 21—Trial resumed, Mo. to strike testimony of witness Mike Lackey was denied. Plaintiff rests subject to hrg. on pltf's Mo. that all the testimony and exhibits heretofore admitted as to certain defts be admitted to all defts. Contd. to Apr. 22nd for hrg. of Mos. in absence of the Jury, jury excused until Apr. 23rd at 10 a.m.

1954

Apr. 22—Trial resumed, Motion by plaintiff to reopen case for purpose of introducing certain exhibits, granted. Motion by defts. to strike the testimony of certain witnesses granted in part and denied in part. Mo. by defts. for mis-trial denied. Motion by defts. to strike certain exhibits granted in part and denied in part. Motion for judgment of acquittal denied as to all defendants except deft. Blau. Motion for judgment of acquittal granted as to deft. Blau and her bond exonerated. The motion, heretofore made, that the testimony of certain witnesses be admitted as to all defts. was granted as to all defts., except deft. Blau. The defts. offered no evidence and rested.

Apr. 23—Trial resumed, evid. introd., Ord. contd. to Apr. 26th for fur. trial.

Apr. 26—Trial resumed. Jury retired for deliberation at 12:07 p.m., returned at 9:47 p.m. with the following verdict: Defts. Shirley Kremen, Carl Ross, and Samuel Irving Coleman were found Guilty with respect to counts one, two, three and four. The deft. Sidney Steinberg was found Guilty with respect to counts one and two. Ordered all the defendants remanded to the custody of the Marshal and this case contd. to May 3rd for hearing a motion for a new trial and for judgment.

1954

May 3—Richard Gladstein, Esq., made a motion for judgment of Acquittal, for a new trial and in Arrest of Judgment on behalf of all the defendants, each of said motions were denied. A request that ea. deft. be permitted to address the court before sentence was granted.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Shirley Kremen, 546 North Sierra Bonita, Los Angeles, California.

Name and address of appellant's attorney: Gladstein, Andersen & Leonard, 240 Montgomery Street, San Francisco 4, California.

Offense: Count I—Violation of 18 USCA § 3. Count II—Conspiracy to violate 18 USCA § 3. Count III—Violation of 18 USCA § 1071. Count IV—Conspiracy to violate 18 USCA § 1071.

Concise statement of judgment or order, giving date, and any sentence: May 3, 1954—Imprisonment for 1 year on Count I; for 1 year on Count II; for 6 months on Count III; for 6 months on Count IV. All sentences to run concurrently.

Name of Institution where now confined, if not on bail: San Francisco County Jail.

I, the above-named appellant, hereby appeal to

the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: May 3, 1954.

GLADSTEIN, ANDERSEN & LEONARD,
/s/ By NORMAN LEONARD,
Attorneys for Defendants

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Carl Ross, 1126 Plymouth Avenue North, Minneapolis, Minnesota.

Name and address of appellant's attorneys: Gladstein, Andersen & Leonard, 240 Montgomery Street, San Francisco 4, California.

Offense: Count I—Violation of 18 USCA §3. Count II—Conspiracy to violate 18 USCA §3. Count III—Violation of 18 USCA §1071. Count IV—Conspirary to violate 18 USCA §1071.

Concise statement of judgment or order, giving date, and any sentence: May 3, 1954—Imprisonment for 1 year on Count I; for 1 year on Count II; for 6 months on Count III; for 6 months on Count IV. Sentences on Counts I and II to run concurrently; sentences on Counts III and IV to run consecutively with each other and consecutively with the sentences imposed on Count I.

Name of Institution where now confined: San Francisco County Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

May 3, 1954.

GLADSTEIN, ANDERSEN & LEONARD,

/s/ By NORMAN LEONARD,

Attorneys for Defendants.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Samuel Irving Coleman, 249 E. Broadway, New York, New York.

Name and address of appellant's attorneys: Gladstein, Andersen & Leonard, 240 Montgomery Street, San Francisco 4, California.

Offense: Count I—Violation of 18 USCA §3. Count II—Conspiracy to violate 18 USCA §3. Count III—Violation of 18 USCA §1071. Count IV—Conspiracy to violate 18 USCA §1071.

Concise statement of judgment or order, giving date, and any sentence: May 3, 1954—Imprisonment for 1 year on Count I; for 1 year on Count II; for 6 months on Count III; for 6 months on Count IV. All sentences to run consecutively.

Name of Institution where now confined: San Francisco County Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: May 3, 1954.

GLADSTEIN, ANDERSEN & LEONARD,
/s/ By NORMAN LEONARD,
Attorneys for Defendants.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Sidney Steinberg, 1161 Shakespeare Avenue, Bronx, New York.

Name and address of appellant's attorneys: Gladstein, Andersen & Leonard, 240 Montgomery Street, San Francisco 4, California.

Offense: Count I—Violation of 18 USCA §3. Count II—Conspiracy to violate 18 USCA §3.

Concise statement of judgment or order, giving date, and any sentence: May 3, 1954—Imprisonment for 2 years on Count I; for 1 year on Count II. Sentences to run consecutively.

Name of Institution where now confined: San Francisco County Jail.

I, the above-named appellant, hereby appeal to

the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: May 3, 1954.

GLADSTEIN, ANDERSEN & LEONARD,

/s/ By NORMAN LEONARD,

Attorneys for Defendants.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Come now the defendants above-named and pursuant to the rules in such cases made and provided hereby state the points upon which they intend to rely in connection with the appeal in the above-entitled cause.

I.

The indictment and each count thereof do not state facts sufficient to constitute an offense against the United States.

II.

The evidence against the defendants and each of them was obtained as a result of an unlawful search and seizure and the trial court erred in denying defendants' motions to suppress it.

III.

The evidence is insufficient to support the ver-

dicts or any of them against the defendants or any of them on any of the counts of the indictment.

IV.

The trial court erred in denying defendants' motions for judgment of acquittal.

V.

The trial court erred in refusing to charge the jury as requested by the defendants.

VI.

The trial court erred in charging the jury as it did.

VII.

The trial court erred in denying defendants' motions for a mistrial.

Dated: May 6, 1954.

GLADSTEIN, ANDERSEN & LEONARD,

/s/ By NORMAN LEONARD,

Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed May 6, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

You are hereby notified that the defendants above-named hereby designate the following as their record on appeal in the above-entitled cause:

1. The indictment.

2. The motions to dismiss, for a bill of particulars, for the issuance of a pretrial subpoena, and for discovery and inspection, filed on or about October 22, 1953.

3. The orders of the trial court denying the motions to dismiss, for a bill of particulars, for the issuance of a pretrial subpoena, and for discovery and inspection, entered on or about November 27, 1953.

4. The pleas.

5. The motion for the return of seized property filed on or about February 4, 1954.

6. The order and memorandum opinion denying the motion for the return of seized property and granting the government's motion to dismiss said motion, entered on or about February 8, 1954.

7. The motions for return of seized property and its suppression as evidence as to defendants Kremen and Blau, filed on or about March 26, 1954.

8. The affidavits submitted in support of the foregoing motions, filed on or about March 26, 1954.

9. The order denying the motions for return of seized property and its suppression as evidence as

to defendants Kremen and Blau, entered on or about April 13, 1954.

10. All of the instructions submitted by the defendants.

11. All of the instructions given by the trial court.

12. The stenographic record of the motion for judgment of acquittal made in open court on April 22, 1954, at the conclusion of the government's case; unless it will also appear in the reporter's transcript designated as Item 25 below.

13. The stenographic record or the minute order containing the ruling upon the aforesaid motion; unless it will also appear in the reporter's transcript designated as Item 25 below.

14. The stenographic record of the motion for a judgment of acquittal made in open court on April 22, 1954, at the conclusion of all of the evidence; unless it will also appear in the reporter's transcript designated as Item 25 below.

15. The stenographic record or the minute order containing the ruling upon the aforesaid motion; unless it will also appear in the reporter's transcript designated as Item 25 below.

16. The verdicts.

17. The stenographic record of the motions for judgment of acquittal, new trial, and arrest of judgment made in open court on May 3, 1954; unless it will also appear in the reporter's transcript designated as Item 25 below.

18. The stenographic record or the minute order containing the rulings upon the aforesaid motions;

unless it will also appear in the reporter's transcript designated as Item 25 below.

19. The judgment and sentence against each of the defendants.

20. The notices of appeal.

21. The entire reporter's transcript of the proceedings dealing with motions to suppress, which proceedings occurred on or about February 8, 1954, April 5, 1954, and April 13, 1954.

22. All of the exhibits received in evidence.

23. The stenographic record of the motions for mistrial made on April 12, 15, 19, and 20, 1954; unless it will also appear in the reporter's transcript designated as Item 25 below.

24. The stenographic record or minute order containing the ruling upon the aforesaid motions; unless it will also appear in the reporter's transcript designated as Item 25 below.

25. The entire reporter's transcript of the trial proceedings commencing on April 12, 1954, and terminating on May 3, 1954.

26. The statement of points to be relied upon on appeal dated May 6, 1954.

27. This designation of record on appeal.

Dated: May 6, 1954.

GLADSTEIN, ANDERSEN & LEONARD,

/s/ By NORMAN LEONARD,

Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed May 6, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO DOCKET RECORD ON APPEAL

Upon reading the affidavit of Norman Leonard, and good cause appearing therefor,

It Is Hereby Ordered that the time within which defendants may docket the record on appeal in the above-entitled matter may be, and it is hereby, extended to and including the 14th day of July, 1954.

Dated June 11, 1954.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF NORMAN LEONARD IN SUPPORT OF APPLICATION FOR ORDER FOR EXTENSION OF TIME WITHIN WHICH TO DOCKET RECORD ON APPEAL

State of California,
City and County of San Francisco—ss.

Norman Leonard, being first duly sworn, deposes and says: That he is one of the attorneys for defendants above-named. That the time within which the record on appeal in the above-entitled matter may be docketed expires on June 14, 1954. That your affiant has been informed by the official court

reporter that certain portions of the transcript of testimony taken in the above-entitled matter have not yet been transcribed because of the fact that the press of business has prevented the reporter from completing the task. The reporter informs your affiant that he expects the entire record will have been transcribed within a period of thirty days from June 14, 1954.

Wherefore, your affiant prays for an order extending the time within which to docket the record on appeal in the above-entitled matter to and including the 14th day of July, 1954.

/s/ NORMAN LEONARD

Subscribed and sworn to before me this 9th day of June, 1954.

[Seal] PEARL STOCKWELL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies thereof, in the above-entitled case, and that they

constitute the record on appeal herein as designated by the attorneys for the appellants:

Indictment.

Motion to dismiss.

Motion for discovery and inspection.

Motion for bill of particulars.

Motion for the issuance of a pretrial subpoena.

Notice of motion for the return of seized property.

Notice of motion for the return of seized property and its suppression as evidence.

Notice of motion for the return of seized property and its suppression as evidence.

Affidavit for the return of seized property.

Order.

Defendants' proposed instructions.

Verdict as to Shirley Kremen.

Verdict as to Carl Ross.

Verdict as to Samuel Irving Coleman.

Verdict as to Sidney Steinberg.

Judgment and commitment as to Shirley Kremen.

Judgment and commitment as to Carl Ross.

Judgment and commitment as to Samuel Irving Coleman.

Judgment and commitment as to Sidney Steinberg.

Excerpts from docket entries.

Notice of appeal of Shirley Kremen.

Notice of appeal of Carl Ross.

Notice of appeal of Samuel Irving Coleman.

Notice of appeal of Sidney Steinberg.

Statement of points to be relied upon on appeal.

Designation of record on appeal.

Order extending time within which to docket record on appeal.

Affidavit of Norman Leonard in support of application for order for extension of time within which to docket record on appeal.

Thirteen volumes of Reporter's transcript.

Plaintiff's Exhibits 1 to 25, inclusive.

Plaintiff's Exhibits 29 to 30, inclusive.

Plaintiff's Exhibit 78 to 81, inclusive.

Plaintiff's Exhibits 83 to 86, inclusive.

Plaintiff's Exhibit 88.

Plaintiff's Exhibits 90 to 111, inclusive.

Plaintiff's Exhibits 113 to 115, inclusive.

Plaintiff's Exhibits 120 to 122, inclusive.

Defendants' Exhibits A to A-14, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of July, 1954.

[Seal] C. W. CALBREATH,
Clerk.

/s/ By WM. C. ROBB,
Deputy.

[Title of District Court and Cause.]

MOTION TO SUPPRESS EVIDENCE — MOTION TO RETURN SEIZED PROPERTY

Monday, April 5, 1954

Appearances: For Plaintiff: United States Attorney, by Robert H. Schnacke. For Defendants: Gladstein, Andersen & Leonard, by Richard Gladstein.

The Clerk: The United States versus Shirley Kremen, et al; motion to suppress evidence, motion to return seized property.

(Opening statements made on behalf of the respective parties.)

WILLIAM H. WHELAN

a witness called on behalf of the defendants being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: Q. Will you please state your name to the Court. A. William H. Whelan.

Direct Examination

Mr. Gladstein: Q. Mr. Whelan, you are with the Federal Bureau of Investigation, are you not?

A. Yes, sir.

Q. And directing your attention to the month of August of last year, you were so engaged and employed at that time as well, were you not?

(Testimony of William H. Whelan.)

A. Yes, sir.

Q. Now, on a date in August, the 27th of August, 1953, did you participate in the making of certain arrests of some of the defendants in this case at a house—property at Twain Harte, California? A. Yes, sir.

Q. Who was the agent in charge?

A. I was, sir.

Q. And do you recall what time of the day approximately this arrest was made?

A. It was about five minutes after one in the afternoon.

Q. In the afternoon. And who besides yourself participated in the making of the arrests?

A. Several agents. In other words, under my supervision at that time.

Q. How many?

A. Totaling in numbers, as I recall, about fifteen, and one matron.

Q. And one matron?

A. And one matron.

Q. Fifteen agents and one matron. By "matron" you mean a woman employee?

A. That's right.

Q. I see. I take it then, is it correct, that you were expecting to make a search, were you, of a woman that you intended to arrest?

Mr. Schnacke: Object to that as calling for the conclusion of the witness and as a leading question.

Mr. Gladstein: Well, it certainly is leading but

(Testimony of William H. Whelan.)

I should have the right to ask leading questions. As far as the other objection, I——

Mr. Schnacke: I see no propriety in the asking of leading questions of a government employee, regardless of who the defendants might be.

Mr. Gladstein: May I state——

The Court: I am wondering whether or not the purpose of having an agent of the opposite sex would have any materiality.

Mr. Gladstein: It certainly would go—if your Honor will permit me to some of the factual foundations for my legal point that the conduct engaged in by the agents in the search and seizure was improper.

The Court: Well, that might be true, but I don't see what materiality there would be as to who the agents were, what the intentions were with respect—what the reasons were for having a woman officer present.

Mr. Gladstein: Well, if I might say so——

The Court: I will sustain the objection to the question in that form. What the facts are you, of course, can bring out.

Mr. Gladstein: Very well.

Your Honor, may I ask this, in view of Mr. Schnacke's objection, I should like to state that I think I should be accorded the right to ask leading questions of the witness and that the asking of leading questions should not be objectionable inasmuch as this witness is presumably, as an employe and agent of the United States, the adverse party

(Testimony of William H. Whelan.)

in this case, one who occupies a position of such character as that, that I should be permitted to proceed as though the witness were under cross examination.

Mr. Schnacke: If your Honor please——

The Court: Don't argue over that. That is an abstract question in advance. You ask the questions and I will rule on them.

Mr. Gladstein: Very well.

Mr. Gladstein: Q. When and on what day approximately, Mr. Whelan, did you make the decision to make this arrest?

A. Well, the actual decision to make the arrest was made on the day of the arrest.

Q. What's that?

A. Made on the day of the arrest.

Q. When on that day?

A. Oh, approximately an hour—fifteen minutes—between thirty minutes and an hour before the actual arrest was made.

Q. Did you make that decision or communicate that decision to those who were with you——

A. Yes, sir.

Q. ——or whom you were in charge of?

A. Yes, sir.

Q. On what day did you consider—begin considering the question of arresting any of the occupants of that house?

Mr. Schnacke: If your Honor please, I will object to that as immaterial. The considerations, ideas,

(Testimony of William H. Whelan.)

prior to an arrest of the arresting agents have no materiality in such a motion as this.

The Court: I think the objection is good. Sustained.

Mr. Gladstein: Q. At the time that you made the decision to make the arrests who did you decide that you were going to take into custody under arrest?

Mr. Schnacke: Same objection, your Honor.

The Court: Yes. I can't see the materiality of the mental processes of arresting officers prior to an arrest. What were the facts at the time of the arrest, they are only material here in this proceeding. They might have had good, bad or indifferent motives. A lot of things may have entered into a decision as to making an arrest. I don't see that that has any materiality on a motion of this kind.

Mr. Gladstein: You don't wish to engage in argument——

The Court: Whatever you had in mind that is pertinent, you can certainly bring out as to the facts that occurred.

Mr. Gladstein: I want to show facts that would show that the arrest, at least as to certain of the defendants, was not lawful and not valid.

The Court: What they had in mind wouldn't have anything to do with that. The circumstances wouldn't determine the legality of the arrests.

Mr. Gladstein: Q. Mr. Whelan, you were present at the time four of these defendants were taken

(Testimony of William H. Whelan.)

into custody at this house in Twain Harte, isn't that so?

A. The word "before" there,—I don't get the meaning there. I was present at the time of the arrest.

Q. I thought I said "four". I was referring to four of the defendants.

A. Oh, excuse me.

Q. Were you present when the defendant, Patricia Blau later on was arrested?

A. No, sir.

Q. So we will confine your testimony to the arrest at Twain Harte. A. Thank you, sir.

Q. All right. You found that to be—appear to be private premises located in the town of Twain Harte, did you not?

Mr. Schnacke: Object to that as leading.

Mr. Gladstein: I will withdraw it.

Mr. Gladstein: Q. Just before you made the arrests, will you tell the Court from your best recollection a description of the premises outside and inside in which the arrests occurred?

A. Well, the premises were a cabin located, to the best of my knowledge, outside the village of Twain Harte off a secondary road, and I would judge that the cabin was located some fifty to seventy-five yards back from the road. It was an isolated cabin in the sense that there were not any other cabins visible in the area, from the road at least.

There were trees in front of it and set to one

(Testimony of William H. Whelan.)

side and to the back apparently in somewhat of a meadow on the other side, although there were some trees in it, but it was more meadow than the other territory.

The cabin itself appeared to be a two-story structure with a little porch on one side of it.

And after entering, it was noted that there was a living room and dining room, as I recall, and a lavatory and a kitchen on the first floor, and I believe two bedrooms upstairs on the second floor.

Q. As you approached, how did you approach, on foot or in automobiles?

A. In automobiles. I approached.

Q. How many such automobiles were there?

A. There were six automobiles in all.

Q. Containing agents of the Federal Bureau of Investigation? A. Yes, sir.

Q. Did you drive off the roadway onto the premises, constituting the yard area?

A. There was what I would call a driveway leading from the secondary road up to this cabin and apparently beyond this. This road also branched off and apparently went to another cabin. That I am not certain because I did not explore it, but this little roadway leads to the front of the house and the side, in other words.

Q. So you and the other automobiles drove up the roadway toward the front of the house?

A. To the front of the house, right.

Q. When you got out did you find one or more of the defendants seated out in the yard?

(Testimony of William H. Whelan.)

A. Yes. They were not—. I found two defendants out in the yard. They were not seated. They were standing.

Q. Who were they?

A. I don't know that they were two of the defendants in this action. They were two defendants in actions, however, Robert Thompson and Sidney Steinberg.

Q. And what, if anything, was done with regard to Robert Thompson and Sidney Steinberg?

A. Well, I announced that we were agents of the Federal Bureau of Investigation and that we were there to arrest them. I called on them to surrender, as well as anyone else in the vicinity.

Q. Was there anybody else?

A. They responded by putting their hands in the air and I directed agents to go in the house——

Q. Before you go to that, tell us what was done with Thompson and Steinberg at that time, after they raised their hands.

A. I directed two positions for them to go to.

Q. What?

A. In other words, they were within ten feet—to take them out of the doorway, get them over in a safe area. I directed that they go over to two trees that were there in the yard.

Q. Yes.

A. And directed that the agents take charge of them, search them and be responsible for them.

Q. Did you tell the agents what to do or did you see what the agents did with them at that

(Testimony of William H. Whelan.)

point? A. Yes. They searched them.

Q. And what else?

A. I don't believe we searched them at that particular moment. It wasn't until after we went in and took into custody these three persons who were on the inside of the cabin.

Q. Let's stay for a moment, Mr. Whelan, with Thompson and Steinberg.

What was done with regard to them at the time they took these positions near the trees that you directed them behind?

A. Well, they were searched, sir.

Q. Isn't it true that their hands were put——

A. They—. Go ahead.

Q. ——their hands were put around trees and they were handcuffed, isn't that right?

A. No, sir, their hands were not put around trees at any time.

Q. Not at any time? A. Oh, no.

Q. Were they handcuffed?

A. Yes, sir, they were handcuffed.

Q. At that time?

A. After they were searched, they were handcuffed and permitted to sit on the ground there beside the tree.

Q. All right. Was any weapon found on them, on any of them, at the time of the search?

A. No.

Q. At that time did you or did any agent at your direction advise either of those men, that is,

(Testimony of William H. Whelan.)

Steinberg or Thompson, what they were under arrest for?

A. I believe it was—. I advised them all, in other words, when all five persons were taken outside——

Q. Officer, I asked you if, at that time, when you had Thompson and Steinberg in custody and had them handcuffed, did you, yourself, or did any agent under your direction advise either of them as to the reasons for their arrest? A. Yes.

Mr. Schnacke: If the Court please, the witness has answered.

The Witness: A. I advised them that they were being arrested because of the warrants that were outstanding for the arrest of both of them in the Southern District of New York.

Mr. Gladstein: Very well.

Mr. Gladstein: Q. Now, did you have those warrants, or copies of them, with you?

Mr. Schnacke: Object to that as immaterial. There is no necessity for the arresting officers to carry warrants with them. It is immaterial whether he has them with him or not.

The Court: What is the point of that?

Mr. Gladstein: I want to know what the authorization was that the officer had, how he received it, and the one possibility is that he had a copy of——

Mr. Schnacke: Are you denying there were warrants outstanding for the arrest of these men?

Mr. Gladstein: I am not conceding——

(Testimony of William H. Whelan.)

Mr. Schnacke: There is no issue with respect to that.

Mr. Gladstein: I am not conceding anything about the validity.

The Court: I don't think these motions would have anything to do with it.

Mr. Gladstein: But it might relate to the other arrests.

The Court: I don't see the materiality of that. I will sustain the objection.

Mr. Gladstein: Q. Did you have an arrest—warrant for the arrest of any of the defendants, other than Steinberg and Thompson?

Mr. Schnacke: Same objection.

The Court: Have you any point with respect to the others that have to do with the warrants?

Mr. Gladstein: Yes. I wish to elicit if it is the fact, and I think it is that no warrant of arrest was ever secured or issued by any authority for the arrest of the defendants other than Steinberg and Thompson.

The Court: Isn't that a matter of record?

Mr. Schnacke: It is, your Honor.

The Court: Let's not waste time about things that are not—that are in the record.

Mr. Gladstein: Can it be stipulated to?

Mr. Schnacke: I don't think there is any necessity to stipulate to the record. The record speaks for itself without stipulation.

Mr. Gladstein: The record does not speak unless it says o on the subject and, if I understand the

(Testimony of William H. Whelan.)

California question correct, I should like to state then for the record that as I understand what just happened is that it is agreed to be the truth that no warrant for the arrest of the defendants, Shirley Kremen, Carl Rasi, Carl Ross and Samuel Coleman, was ever obtained.

The Court: Are you talking prior to the arrest?

Mr. Gladstein: Prior to the arrest.

The Court: I don't see that it has any particular materiality on the motion to suppress.

Mr. Schnacke: It is correct, your Honor.

The Court: It is correct?

Mr. Schnacke: There were warrants outstanding for Thompson and Steinberg, and the arrest was made for the offense being committed in the presence of the officers by the other defendants found in the cabin.

Mr. Gladstein: Q. After Thompson and Steinberg were handcuffed did you then go into the premises themselves?

A. I don't know whether it was after they were handcuffed or not. My recollection is that it was before actually—but—yes, I did. I directed first that other agents go in and I followed them in, and all three parties on the inside were directed to come outside also, and they were directed to take particular positions—in other words in a semi-circle—where they were—the men were searched and then they were handcuffed and seated. The young lady was searched with the help of the matron.

Q. She what?

(Testimony of William H. Whelan.)

A. She was searched with the help of the matron and then she was seated on a chair, as I recall, outside by the porch.

Q. And what, if anything, did you or any of your agents say to any or all of these three people in the house?

A. They were advised that they were being arrested by virtue of the fact that they were harboring the two people who we had warrants outstanding for.

Q. Do you remember what you said in that regard, if you said anything? Did you say that to any of the defendants?

A. Yes, sir. If it wasn't in those words, it was that substance.

Q. When was that, while still in the house or after you had taken them outside?

A. While they were all outside. In other words, in every instance I tried to advise them—in other words, when they were all in each other's presence.

Q. Is this correct then, Mr. Whelan, that you found the other three defendants in the house, that would be Ross, Shirley Kremen and Coleman?

A. Yes, sir.

Q. And you gave orders to cause them to be taken outside? A. Yes, sir.

Q. And outside there they were told they were under arrest for the reasons that you indicated?

A. Yes, sir.

Q. Were they all handcuffed?

(Testimony of William H. Whelan.)

A. They were all then handcuffed, correct.

Q. They were all subject to a personal search?

A. That's right, sir.

Q. And I take it no weapons of any kind were found on any of them?

A. That's right, sir.

Q. Then what did you do with the defendants?

A. They were fingerprinted and they were photographed. Then they were told that they would be taken in without any more delay than was necessary, to be arraigned and that in view of the fact that we had to take them to San Francisco that if they cared to make any choice of clothing they would then be taken in and could make whatever choice of clothing they desired to make to wear into the city for the arraignment, or any other material that they needed to take with them.

So one by one they were each taken in the house to make whatever change of clothes they cared to make and to pick up anything else they wanted to pick up.

They were also advised that if there was any property in the vicinity inside or outside, of a valuable nature or personal nature, since the place was located in the woods as it was, that if they would make it known we would locate it and try to safeguard it in some way.

And when the whole proceeding was completed which was within approximately an hour, they were then advised that they were going to be taken to San Francisco.

(Testimony of William H. Whelan.)

Each one was placed in a separate automobile and we came to San Francisco, arriving here shortly after six o'clock, and they were arraigned—. They were then asked to order dinner. Two stops were made on the way in. After we arrived here they ordered dinner and then the arraignment was held, as I recall sometime after eight o'clock.

Q. Now, Mr. Whelan, was it then—. On what day, that same day of the arrest, the 27th, was it, or was it some later day, that the premises at this house at Twain Harte was subjected to a search and the contents taken, the contents that constitutes this compilation that was made here some time ago?

Mr. Schnacke: As to the extent of your knowledge, Mr. Whelan.

A. Oh, I told the parties, as a matter of fact, at that time that I was leaving a group of men in order that we could expedite coming into the city and holding the arraignment, and I would leave some men to complete this search, to obtain whatever was there that should be obtained or secured, they should secure the house and should secure the automobiles also because of the location of the premises as it was in the woods, I felt that there was a necessity to secure the premises as best we could.

Q. You mean by that, in order to avoid some pilferage or loss in some manner of the items that belonged to one or the other of the defendants?

A. Yes, sir.

Q. You must have received a report at some

(Testimony of William H. Whelan.)

time in these proceedings as to the actual conduct of the search and the items that were seized. Can you not tell me from that when that was actually done?

Mr. Schnacke: Object to that as hearsay.

The Witness: A. Well the search was completed anyway.

Mr. Schnacke: Just a moment. I object to that as hearsay, your Honor.

Mr. Gladstein: Calling for information in an official report in the ordinary line and course of business.

The Court: Well, I will overrule it. The only question is when was the search made and the articles removed.

Mr. Gladstein: Yes, your Honor, that is the question.

The Court: Overruled.

Mr. Gladstein: Q. Was it that day or the next day?

A. No, it was completed that afternoon.

Q. All right. And where were the articles taken?

A. They were taken here in San Francisco to our office.

Q. When did they arrive?

A. Well, I have forgotten the exact time but it was later on that evening.

Q. Was anything at all left in the premises after this search or was everything taken out that was movable?

A. Well, anything of a—I don't really know

(Testimony of William H. Whelan.)

what was—I wasn't there, in other words, when they left. The principal things that were to be taken were those things that belonged to the—in any way to the defendants. The furniture and those sort of things—in other words, apparently it was a well-furnished cabin. There was no furniture of any sort taken.

Q. Is it correct that the directions you gave were substantially that with the exclusion of the items of furniture, such as beds, tables, chairs, that items of movable personal property were to be removed?

A. Any personal property, that's right.

Q. Your answer to my question is yes?

A. My answer to your question is personal property.

Q. Mr. Whelan, did you secure or attempt to secure a search warrant for the premises?

A. No, sir. This was conducted incidental to the arrest.

Mr. Gladstein: I move the last part of the answer be stricken. I only asked him if a search warrant had been sought.

The Court: Of course, that is the issue in the case.

Mr. Gladstein: Yes, I know, but it is for the Court rather than Mr.—I know your Honor won't be influenced by his statement of it, but I would rather——

The Court: All right, the last part of the answer, last half of the answer, may go out.

(Testimony of William H. Whelan.)

Mr. Gladstein: Q. And it is correct that no search warrant was ever obtained, isn't that correct? A. That's correct.

Q. Was there any reason why a search warrant could not have been sought from a magistrate?

Mr. Schnacke: Object to that as immaterial. The search was a valid search made incident to an arrest. There is no necessity under those——

The Court: That calls for a certain conclusion. I will sustain the objection.

Mr. Gladstein: Q. Were you searching the house for something in particular?

Mr. Schnacke: Object to that as calling for a conclusion of the witness and assuming a fact not in evidence. This witness did not make the search.

The Court: Was he searching the house for something in particular; that would call for a state of mind of those who made the search. I will sustain the objection. It is what they did that counts. That is the only thing that is involved, as it is in every such case. It is what was done.

Mr. Gladstein: Q. What were you looking for, if anything in particular, at the time that you directed the search to be made.

Mr. Schnacke: Object to that as being asked and answered, and on the further ground this witness did not make the search. He already testified he directed his agents to take from the premises the personal property that did not appear to be the furnishings of the cabin. That answers the question

(Testimony of William H. Whelan.)

as fully as this witness has indicated any ability to answer it.

The Court: Well——

Mr. Schnacke: This witness wasn't looking for anything.

The Court: Well, he was the agent in charge, but what is the last question—was he searching for anything in particular?

Mr. Gladstein: Yes. What was it that he was searching for?

Mr. Schnacke: What were you looking for?

The Court: I will sustain the objection.

Mr. Gladstein: Q. Did you tell the agents to look for anything in particular?

A. No, there was no specific matter that they were to look for in particular, but it was the general rules; in other words, that you search for whatever is incident to—any weapons, for instance.

Mr. Gladstein: Q. Did you find any weapons?

A. Any contraband or anything that would be a fruit of the crime or a part of the crime.

Q. Those were their directions, standing directions? A. Yes, sir.

Q. All right, and following this search was it disclosed whether any weapons were found on the premises?

A. No, sir, no weapons were found.

Q. Neither on the persons of the defendants or any of the persons arrested or on the premises?

A. That's right, sir.

Q. Was any contraband found?

(Testimony of William H. Whelan.)

Mr. Schnacke: Object to that as calling for the opinion and conclusion of the witness.

The Court: Yes. Sustained. You can ask him what he found?

Mr. Gladstein: Well, it consists of twenty-five pages.

The Court: Offer it in evidence. Then if it is of any importance——

Mr. Gladstein: If your Honor has it there, I will do that. I only have this copy.

The Court: Have it identified and ask him if that was the list that was taken and offer it in evidence.

Mr. Gladstein: Q. Look through that if you will, Mr. Whelan, and state if that is what it purports to be.

(Handing witness.)

The Witness: A. This list was prepared under my supervision of the material that was taken at the cabin.

Mr. Schnacke: I am sorry, your Honor, there are only two copies of this list that I know of. I have one carbon copy here.

Mr. Gladstein: I will undertake to have a copy stricken off and your Honor can have the original.

The Court: Do you want to mark that in evidence?

Mr. Gladstein: Then I will be without it.

The Court: Yon can withdraw it and make a copy of it.

(Testimony of William H. Whelan.)

Mr. Gladstein: Very well, your Honor, I will do that.

The Court: Any objection to this going in evidence?

Mr. Schnacke: No objection.

The Court: Do you want it marked?

Mr. Gladstein: Yes, your Honor.

The Court: Mark it in evidence.

The Clerk: Defendant's Exhibit A introduced and filed into evidence.

(Whereupon document consisting of 25 pages entitled, "Personal Property and Papers", received in evidence and marked Defendant's Exhibit A.)

Mr. Gladstein: Has your Honor had a chance to look through this?

The Court: No. Unless you want to make reference to it—You may want to make use of it.

Mr. Gladstein: Very well.

Mr. Gladstein: Q. Before undertaking these arrests did you have any information of any kind leading you to believe that the defendant, Shirley Kremen was committing any offense.

Mr. Schnacke: Object to that as not being material. The state of mind of the arresting officer is not material to this inquiry.

Mr. Gladstein: I want to say that the information that the arresting officer has in advance and when he acquires it is, I submit, most germain to the question of the validity of the search or seizure and may even go to the validity of the arrests, too,

(Testimony of William H. Whelan.)

because it is generally the rule that if the officer wants to arrest somebody and he knows about it in advance he should seek and obtain from a magistrate the warrant of arrest. He should have reasonable grounds upon which he can arrest properly, and that a magistrate shall grant the search warrant, and that is what the function of a magistrate is, to stand between the officer who wants to do the arresting and the person whose privacy is going to be disturbed. I don't know of any other way of getting these——

The Court: Of course that goes to the question of the arrest. But I don't quite know what you are getting at on the motion to suppress evidence.

Mr. Gladstein: May I say in answer then, it is this, if your Honor please, as I read the cases, and setting apart for the moment the question of the defendant, Steinberg and the defendant, Thompson——

Mr. Schnacke: How can we set that apart? That was the essential arrest made at the premises. I think it is a little difficult to set that apart from any other part of that single transaction.

Mr. Gladstein: Well, that is a matter of argument, that Mr. Schnacke is advancing, but the fact of the matter is that even if an officer has reason to believe that a person for whom there is an outstanding warrant of arrest—let us assume—is to be found in a particular location, a dwelling house, that is not a probable cause or sufficient reason to go in and arrest everybody else in that dwelling.

(Testimony of William H. Whelan.)

The Court: That all depends on the circumstances.

Mr. Gladstein: That is just what I am inquiring about. What were the circumstances?

The Court: I don't—it doesn't seem to me it is material what the state of mind of the officer was as to the persons for whom he did not have a warrant of arrest, as long as he was acting under warrants of arrest of persons whom he believed to be in a certain place.

Mr. Gladstein: He arrested them.

The Court: I don't believe his state of mind with reference to anybody else has anything to do with it.

Mr. Gladstein: I don't think it is a state of mind. I didn't ask him about his state of mind, your Honor. I asked him what information he had before he went there.

The Court: I will sustain the objection.

Mr. Gladstein: Q. Did you or did someone in superior authority to you make the decision to arrest the persons, all of them who were actually arrested that day?

A. Well I made the decision in consultation.

Q. And when was that decision made in consultation, when was the consultation had?

A. Well, in other words, if there was others—if a known fugitive is there, if there are others there that it can be said could be part of the harboring process——

Q. Was that the subject of consultation?

(Testimony of William H. Whelan.)

A. ——then the others should be taken too.

Q. I say, was that the subject of consultation?

A. Yes, sir.

Q. That was the subject of the decision?

A. Yes, sir.

Q. In other words, that anybody and everybody that you found at or near the premises would be taken into custody on the theory they might be harboring, is that right?

Mr. Schnacke: That is a misstatement of the answer.

The Court: Yes. I will sustain the objection.

Mr. Gladstein: Q. Well, is it true that your consultation and your decision was to take into custody anybody and everybody who might be found on the premises with either of these men that you were looking for, is that right?

Mr. Schnacke: I object to that as a leading question.

The Court: Well, it is leading. It hasn't got much to do with that. I wouldn't pay much attention to that anyhow? How could anyone answer that question?

Mr. Gladstein: Well, he has already said that they consulted about that very matter.

The Court: There might be any number of people there. He said the consultation was—it was determined at the consultation they would take into custody anyone found on the premises that would have anything to do with possible harboring of the defendants for whom they had warrants.

(Testimony of William H. Whelan.)

Mr. Gladstein: Well, your Honor, I didn't so understand the testimony.

The Court: Well, that is what I understood him to say.

The Witness: That is what I tried to say.

Mr. Gladstein: Q. Did you find anything in the search that it was illegal for the defendants to possess?

Mr. Schnacke: I object to that as calling for the conclusion of the witness.

The Court: I don't see the materiality of this, counsel.

Mr. Gladstein: The materiality,——

The Court: He already said that there were no weapons found. Now this runs a pretty wide gamut, anything that was illegal for any person to possess. It might be any number of things.

Mr. Gladstein: Well, but that is——

The Court: Your list will show what was found. Now this calls for the opinion and conclusion of the witness. You can point out on the list if there is anything there that in law prohibits keeping. It takes too much time to go over this.

Mr. Gladstein: Certainly.

The Court: You can point that out if you want to, if there is anything there.

Mr. Gladstein: I beg your pardon?

The Court: I say, if there is anything in that list that is privileged by any statute, you can point that out.

Mr. Gladstein: I will do it the other way. I

(Testimony of William H. Whelan.)

will ask the witness to take the list and to look at it and refresh his recollection and tell us which items, if any, to be found there is forbidden by any statute to possess.

Mr. Schnacke: I object to that as calling for the conclusion of the witness.

The Court: I can determine that. I don't have to have the F.B.I. tell me what is against the law. You can point out the statute. The witness can't give an opinion on legal statutes, on the statutes, as to what is or is not prohibited by law. He can tell what he found there.

Mr. Gladstein: He has done that.

The Court: If there is anything there, that any statute prohibits you can tell me, I will take your word for it. You tell me what statute prohibits it.

Mr. Gladstein: I don't know of any statute.

The Court: All right. If there is no objection to that, let's pass on to something else. You needn't answer that. (addressing the witness.)

The Witness: Thank you, your Honor.

Mr. Gladstein: Q. What, if anything, did you find—withdraw that.

When you got there and you placed the defendants—I am talking about Shirley Kremen and Ross and Coleman—what, if anything did you see or hear them do or say that caused you to decide that they were in the course of the commission of some offense?

Mr. Schnacke: I object to that as a complex

(Testimony of William H. Whelan.)

question. The question may be what did he observe them do.

Mr. Gladstein: All right. I will break it down if that is the objection, that is, complex, to save time.

Mr. Gladstein: Q. What did you see any of them do that caused you to believe that they or any of them were committing an offense?

Mr. Schnacke: The latter part of it is what makes the question complex, actions as affecting his state of mind. He can't testify as to the actions that he observed, not as to what effect they had on his mind.

The Court: It is not the officer's opinion that determines whether or not there is a valid arrest or search and seizure. It is what was done.

Mr. Gladstein: It is what the officer says the defendants did or said as well.

The Court: You can ask him anything you want to as to what the defendants did or said. But as to the impact of that upon the witness, if wouldn't have any weight with me at all as a judge.

Mr. Gladstein: I'm sorry——

The Court: Because I wouldn't care what he thought about it. If the facts were sufficient, they are sufficient. If they are not sufficient, they are not sufficient.

Mr. Gladstein: But in order to ascertain, if your Honor please, whether the arresting officer had proper cause, I understand the decisions clearly to say that we are entitled to ascertain from him

(Testimony of William H. Whelan.)

under examination what he observed or learned by the use of his senses that caused him—led him to feel that an offense had been committed because that is the probable cause.

The Court: The probable cause lies in the facts and circumstances and not what any officer thought about it. Even if he told me on the witness stand now that the facts and circumstances were not—assuming that he would make such a rediculous statement under the circumstances—but presuming that he said the facts and circumstances in his opinion were not sufficient to warrant him taking these people into custody, if the facts and circumstances were such that they were justified, the Court could still hold that the circumstances were sufficient because the agent might not be telling the truth now, the witness might not be telling the truth as to his state of mind. But it isn't his state of mind that determines the matter. I don't care what he says about his state of mind in the matter. It is what the circumstances were at the time. And you may go into that as much as you wish to.

Mr. Gladstein: All right.

Mr. Gladstein: Q. Were all of your agents armed, or most of them? A. Yes, sir.

Q. And the weapons were drawn and directed at the defendants? A. Yes, sir.

Q. All right. And it was after you had displayed the weapons that the search was made, that is true, isn't it? A. Yes, sir.

Q. And none of the defendants were asked for

(Testimony of William H. Whelan.)

any permission to allow the search to be made, were they?

A. They were asked, sir, but the defendants had very little, if anything, to say.

Q. They said nothing to you?

A. Very little.

Q. Well, what did they say, if anything?

A. Well, I can't say that they said nothing, but it was very little that they said, in other words.

Q. Practically nothing?

A. That's right.

Q. So, in other words, it is correct in summary to say that none of the defendants in this case said anything that had to do with the subject of harboring any of the people who were there, is that right? A. (No response.)

Q. Well, they said nothing, isn't that right?

A. They said nothing.

Q. All right. What did you see any of the defendants do at any time just before or during the arrest?

A. Well, they were, in the first place, all living together.

Q. What did you see them do?

A. Living together at this cabin.

Mr. Gladstein: I am going to move this be stricken.

The Court: That's right. All he wants you to tell him now is what did you see the defendants do at the time when you arrived there. I think

(Testimony of William H. Whelan.)

you have covered part of it already, but I don't know whether you covered all of it.

The Witness: A. Well, two of the defendants were outside.

Mr. Gladstein: Q. That is, Thompson and Steinberg? A. And Steinberg.

Q. All right.

A. And three of them were inside the house. They were dressed at that time in what I would call play clothes, sun clothes. There were some laundry on the line. The whole house looked like it was lived in. There were two cars there, as I recall.

The Court: Two automobiles?

A. Two automobiles. There was food in the house.

The Court: Of course you are going a little far afield from the question, which was only what did you see the defendants or any of them do.

Mr. Gladstein: That is the question.

The Court: Q. You have already said that you saw two of them in the yard and they were standing there and had play clothes on.

Now did you see these two defendants before you had gone to the others do anything further?

The Witness: A. Nothing except come out of the house.

The Court: Q. Well you saw the two defendants who were apprehended in the yard, you saw them come out of the house first?

The Witness: A. Yes, sir.

(Testimony of William H. Whelan.)

Mr. Gladstein: Q. And how long after they came out of the house was it that you drove up and arrested them?

A. Why, I suppose it would be, within thirty minutes, thirty to forty-five minutes.

The Court: Q. They were out in the yard then?

Mr. Gladstein: Q. They were out in the yard then for about half an hour?

The Witness: A. Yes, sir.

Q. That is, Steinberg and Thompson?

A. Yes, sir.

Q. You had them under your surveillance?

A. They were recognized, yes, sir.

Q. All right. And then you arrested them and during the period that you had them under surveillance what, if anything, did you observe them do?

A. They were in the yard there talking together.

Q. Anything else?

A. Roaming around together, came out of the house together.

Q. You saw nothing else?

A. Nothing else that I recall.

Q. Then after you placed them under arrest—I come now to direct your attention to the other people, Shirley Kremen, Coleman and Ross—what, if anything, did you see any of them do?

A. See them do?

Q. Yes.

A. I didn't see them do, in the strict sense, anything other than that they were right there and

(Testimony of William H. Whelan.)

gave every indication of being part of the living situation there.

Q. By reason of what did they give that indication?

A. As I say, it was—they were all living together at the house there.

Q. How did you know that?

A. Well, they were found together there.

Q. Anything else that led you to that conclusion.

A. Their clothes were there apparently.

Q. When did you find that out.

A. Found it out for sure right then.

Q. What was it that told you that, any of the defendants? A. No, sir.

Q. Well I come back——

A. There was just the factual situation that existed, in other words. They were there. There was a rent receipt there made out, and so forth.

Q. Made out to whom?

A. As I recall it, it was made out to Shirley.

Q. And you learned that she had rented the premises? A. That was verified later, yes.

Q. All right. You had reason to believe at the time you entered the premises that she was a lawful tenant of the premises?

A. I did not know it. We did not know that fact, in other words at that time.

Q. Did you seek to ascertain at that time?

A. I don't recall whether we sought to ascertain at that time or not, since, as I say, there

(Testimony of William H. Whelan.)

weren't any questions being answered that morning.

Q. When, for the first time, Mr. Whelan, did you have any information that caused you to believe that the defendant, Shirley Kremen might have committed or been in the commission of an offense?

Mr. Schnacke: Object to that as calling for the opinion and conclusion of the witness.

The Court: Read that question.

(Question read by the reporter.)

The Court: Are you saying afterwards?

Mr. Gladstein: Before.

The Court: I will sustain that on the ground that that calls for the opinion and conclusion of the witness.

Mr. Gladstein: Q. When, for the first time, did you receive information as to Shirley Kremen being at or around those premises?

Mr. Schnacke: I object to that as being immaterial. The circumstances of the arrest are the important matter. The first time that information was received is immaterial. It is only the fact of the arrest that is the material thing in this inquiry.

The Court: It seems so to me.

Mr. Gladstein: I have gone through this type of proceeding before in this Court and I don't recall counsel for the prosecution ever objecting to an inquiry about when and how information was obtained. That goes to the essence of whether there was probable cause where a warrant for arrest

(Testimony of William H. Whelan.)

isn't obtained and where an arrest is made without a warrant.

Mr. Schnacke: I have no objection to Mr. Gladstein making any showing that he wants. I will withdraw the objection on that. If he wants to get this information in, it is perfectly all right with me. I don't know what he is trying to bring out.

The Court: The only cases I read and all the motions I have heard on this subject, it doesn't make any difference where the information is obtained or how. The only question is are the circumstances sufficient to warrant or not to warrant or to establish——

Mr. Gladstein: Why, I have some cases that I will be glad to show your Honor, but I don't want to interrupt the examination at this stage in view of Mr. Schnacke's withdrawal of the objection.

The Court: What was the last question?

Mr. Gladstein: Q. When, for the first time, did Mr. Whelan obtain information as to Shirley Kremen being at or on those premises?

The Court: You have no objection to that?

Mr. Schnacke: No I have no objection.

The Court: All right.

The Witness: A. When, for the first time?

Mr. Gladstein: Q. Yes, sir.

A. Well, I knew it for sure, in other words, that day.

Q. But when, for the first time?

A. At the time of the arrest.

Q. By that you mean you verified it that day?

(Testimony of William H. Whelan.)

A. That's right.

Q. Well, my question is when for the first time did you receive information that she was at or within those premises?

A. Well, there, may—I believe, as I recall, there was information within that 24-hour period—in other words, the afternoon before.

Q. Would your answer be the same if I were to ask the same question concerning individually each of the defendants who were taken into custody?

A. Approximately. In other words, within the 24-hour period, right.

Q. When, for the first time, did you receive information that Robert Thompson was at or near those premises?

A. Well, I knew for sure that morning.

Q. What time in the morning?

A. Well, within a half hour or forty-five minutes of the arrest.

Q. That is when you had them under your surveillance, you mean? A. Yes.

Q. When did you obtain information for the first time that caused you to go there to see if Thompson was there; was it the day before, two days before, three days before?

A. Well, it was within the 24-hour period, that time, in other words.

Q. As to Sidney Steinberg, when for the first time did you have information that he was on or within the premises?

(Testimony of William H. Whelan.)

A. I verified it for sure within an hour of the arrest.

Q. But you had information the prior day?

A. Possibly.

Q. Don't you know?

A. The matter of identity, you see, is a very difficult problem. That I know, or that somebody under my jurisdiction, even those—someone that you don't—that you haven't seen too frequently—tht is something that I don't know whether I can say definitely that it was the day before or not. As we look back now, yes, within the 24-hour period. but then we didn't know for sure.

Q. These answers you have been giving "within a 24-hour period," you are saying in effect that your information was obtained about 24 hours or thereabouts prior to the actual arrest?

A. Yes, sir.

Q. Then you were not present at the time Patricia Blau was taken into custody?

A. No, sir.

Q. Did you have anything to do with that arrest?

A. No, I don't remember the circumstances of that arrest. I wasn't present during that arrest and the other arrests were commanding my attention completely at that time.

Q. Well, I appreciate that, Mr. Whelan, but I am simply trying to find out if, prior to the making of the arrest of Patricia Blau you had anything to do with it by way of giving instructions or being

(Testimony of William H. Whelan.)

in consultation or directing that it ought to be done or something of that sort.

A. No, I don't recall that I had anything to do with that decision.

Q. Were you involved in the consultation or consideration of the matter prior to the decision to arrest her?

A. I think that it was made known to me, yes.

Q. After or before the arrest?

Mr. Schnacke: Which arrest?

Mr. Gladstein: Q. Of Patricia Blau?

A. Just before.

Q. And where were you when that happened?

A. In San Francisco.

Q. Was there some other agent who was in charge of the matter of placing Patricia Blau under arrest?

A. Yes, sir, there was. I would have to check my records to remember—to determine just exactly who that was.

Q. You don't know now?

A. I think I remember who it is, but I am not certain.

Q. Who do you think it was?

A. I think Agent Prelsnik.

Q. Prelsnik? A. Right.

Q. Is he still connected with the Bureau here in San Francisco? A. Yes, sir, he is.

Q. May I trouble you to check that after you leave the stand?

A. I don't believe he is in the city, though.

(Testimony of William H. Whelan.)

Q. At the moment, you mean?

A. That's right.

Q. He will be available tomorrow?

A. I will see if there is anything else connected with——

Q. I shall appreciate that very much if you will let Mr. Schnacke or Mr. Foster know so that they can relay that information on to me.

You then had nothing to do and have no information concerning the arrest and the search of the car that Patricia Blau was in, is that correct?

A. That's right, I have no exact knowledge of that, no personal knowledge.

Q. Why didn't you get a warrant to search the premises at Twain Harte?

Mr. Schnacke: Object to that as argumentative, calling for the opinion and conclusion of the witness.

The Court: Sustained.

Mr. Gladstein: Q. Is there any reason from the viewpoint of the F.B.I. why any or all of the items contained in that inventory cannot be returned to the defendants, Mr. Whelan?

Mr. Schnacke: I will object to that as being immaterial and calling for the opinion and conclusion of the witness.

The Court: I don't think the F.B.I. has anything to say about that.

The Witness: That's right, your Honor.

The Court: Once it is in the hands of the United States attorney.

(Testimony of William H. Whelan.)

Mr. Gladstein: Nevertheless, I wanted to get an answer as to whether from the viewpoint of the F.B.I. there is any reason why any or all of these items can't be returned.

The Court: You mean that they are not lost or not available, is that what you mean?

Mr. Gladstein: No. No. I mean as to whether they are, from the viewpoint of the F.B.I. matters that——

The Court: Well, that is far afield from this matter. I don't care what the F.B.I. might say about that. I am not saying that in any critical or deleterious sense of the F.B.I. It just hasn't anything to do. It doesn't make any difference. I will sustain the objection.

Mr. Gladstein: Q. When you returned the automobiles, did you make that decision yourself?

A. No, that decision was presented to the United States attorney.

Q. You mean a request was presented to them or a suggestion or what?

A. On the matter of whether or not those automobiles should properly be returned was decided —in other words, it is a legal problem, not an administrative problem, and the decision was made that they should be returned and we returned them.

Q. Who made the decision, the United States attorney's office?

Mr. Schnacke: I made the decision.

The Court: If it is material. I don't want to shut you off. I don't see what that has to do with the

(Testimony of William H. Whelan.)

question, who made the decision. The automobiles have been returned. You can't complain about the automobiles that have been returned.

Mr. Gladstein: What I am complaining about is that the balance has not been returned.

The Court: The fact that something else has been returned hasn't got anything to do with it.

Mr. Gladstein: I would like to know who's making the decision and on what basis, if your Honor please.

The Court: I am sorry, that is a matter for your opponent in the case to make. I am not going to inquire into that. What has that got——

Mr. Schnacke: I can explain that. We knew who to give the automobiles back to. They had a registered name on it and they were returned. We never found out to this day who wants any of the rest of this property.

Mr. Gladstein: Just turn it all over to me.

Mr. Schnacke: Up to now we still don't know who owns any particular part of this property, your Honor. The automobiles were registered to people other than these defendants and we returned them.

Mr. Gladstein: Well there is a very quick way of handling that. Mr. Schnacke can turn it all over to me and I will give him a receipt on behalf of the defendants.

The Court: Maybe he doesn't want to give to to you.

Mr. Schnacke: I didn't think you were——

(Testimony of William H. Whelan.)

The Court: Business might be bad with you and you might run off with it. I'm being facetious, but all I am intending to say is he wants to return it to whoever establishes their right to it and whoever executes the necessary receipts and so forth, he will return it.

Mr. Gladstein: The only right that seems to me that has to be established is the right to the possession of the premises and therefore everything that is in those premises——

The Court: That is a legal question.

Is there anything else?

Mr. Gladstein: Nothing, except I would remind him if he would——

The Court: Find out who the agent was in charge.

Mr. Gladstein: Yes, sir, so I can develop the facts of that arrest.

The Court: Any questions you wish to ask, Mr. Schnacke?

Mr. Schnacke: Might we take a short recess?

(Short recess taken.)

Cross Examination

Mr. Schnacke: Q. Mr. Whelan, under your instructions had agents of the Federal Bureau of Investigation gone to the vicinity of this cabin at some time prior to this arrest? A. Yes.

Q. And on the day of the arrest, at what hour did agents of the Bureau go to the scene of the arrest?

(Testimony of William H. Whelan.)

A. Well, the first group were in the vicinity of the cabin around 6:00 a.m.

Q. And what time did you appear at the scene?

A. Just at the time of the arrest. In other words, it was about 1:00 p.m., five minutes after one.

Q. Were you in contact with the agents who were observing the cabin from 6:00 a.m. on?

A. Yes, sir, I was in contact with them by radio.

Q. And did they report to you the matters that they observed at the cabin from 6:00 a.m. up until the time of the arrest or until the time you appeared? A. Yes, sir, they did.

Q. What was the nature of that report?

A. The nature of that report was to identify persons as they came out or went in and to name them if they could. The last report I had, Steinberg and Thompson as being present.

Q. And as coming out of the cabin?

A. As coming out of the cabin.

Q. Did you receive any report of any person going into the cabin after 6:00 a.m.

A. No, sir.

Q. Do you recall when the sun rose, when it was on this occasion, that is, August 27, 1953?

A. Well, it was right around—we were then on daylight saving time and it was right around shortly after six o'clock.

Q. So your agents observed that any persons who were in the cabin at the time of the arrest

(Testimony of William H. Whelan.)

had been there at daylight on the morning of the arrest, is that correct?

A. They could not—as I understood it, the agents could not observe anyone on the inside. They saw no one, in other words, go in during that period.

Q. Do you know when the warrant for the arrest of Robert Thompson was issued by the Court for the Southern District of New York?

Mr. Gladstein: I am going to object to that as calling for a conclusion.

Mr. Schnacke: I asked the witness if he knew.

Mr. Gladstein: I don't concede that there has been such a warrant, if your Honor please.

The Court: You mean there has never been a warrant, is that what you mean?

Mr. Gladstein: I have never been able to find out, if your Honor please, whether there was a warrant for the arrest of Robert Thompson, but if there was certainly Mr. Schnacke should be able to supply a copy of it.

The Court: What is the materiality of that?

Mr. Schnacke: I am simply trying to establish the period during which the warrants for the arrest of Thompson and Steinberg had been outstanding.

The Court: What would that have to do with this present motion? I don't see the materiality of that.

Mr. Schnacke: I will withdraw the question.

The Court: I mean, there is some case that has

(Testimony of William H. Whelan.)

been in the books on it, isn't there, that sets forth the case?

Mr. Gladstein: What, your Honor?

The Court: I say, isn't there some case in the other State?

Mr. Gladstein: There is a case in which Robert Thompson was tried for contempt. Is that the case which your Honor has reference to?

The Court: Doesn't that recite the circumstances?

Mr. Schnacke: Yes.

Mr. Gladstein: It doesn't cite anything about a warrant, so far as I know.

The Court: I don't see that there is any materiality to it.

Mr. Schnacke: No further questions.

Mr. Gladstein: Just a couple of questions.

Redirect Examination

Mr. Gladstein: Q. Mr. Whelan, did you learn what the address was of this house in which the arrests were made, did it have an address?

A. Not that I know of, sir.

Q. Did you learn who owned the property?

A. After the arrest we learned, yes.

Q. Who was it?

A. As I recall, the name was Germany.

Q. A Mr. and Mrs. Germany? A. Yes.

Q. You say that your agents were reporting to you from six a.m. that day? A. Yes, sir.

Q. What they observed and what they saw?

(Testimony of William H. Whelan.)

A. Yes, sir.

Q. What did they tell you they saw the defendant, Shirley Kremen do, if anything?

A. I don't recall that they reported anything during that period.

Q. The same question as to the defendant, Coleman, what is your answer?

A. I don't recall that they reported anything.

Q. The same question as to the defendant, Ross.

A. I don't recall they reported anything.

Q. Do you know how your agents were deployed at or about the premises, or did they report to you about that? A. Yes, approximately.

Q. And tell us how many such men there were in the general location that you told them to take.

A. There was a hill to one side of the cabin and they were deployed along that hill.

Q. All of them? A. There were five.

Q. And all were so deployed?

A. Yes, sir.

Q. Do you know whether they were in a position to see and observe every possible means by which a person might come into or leave the premises? A. That was their intent, sir.

Q. You don't know that that was so, do you?

A. No, sir.

Mr. Gladstein: That is all.

(Witness excused.)

THELMA L. GERMANY

a witness called on behalf of the defendants being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: Q. Will you please state your name to the Court. A. Thelma L. Germany.

Direct Examination

Mr. Gladstein: Q. Mrs. Germany, where do you reside, please? A. 631 Third. Modesto.

Q. You and your husband are the owners, are you not, of a piece of property in or near the village of Twain Harte? A. Yes we are.

Q. Were you the owners of that property in the summer of last year? A. Yes, sir.

Q. Have you and your husband lived in the property? A. Yes, sir.

Q. And during what period have you lived in it?

A. Well, we moved from there last—yes, it was last March.

Q. A year ago, in other words? A. Yes.

Q. Had you been living in the premises prior to that? A. Yes.

Q. For how long?

A. About a year and a half.

Q. All year around, in other words?

A. Yes.

Q. Is that a two-story house?

A. Yes, it is.

Q. And it is a dwelling house?

A. Yes, sir.

(Testimony of Thelma L. Germany.)

Q. Are there houses nearby?

A. Yes, there is a house about a hundred foot just below us and there are other houses around, but you can't see them very good for the trees. Only this side of the hill.

Q. It is a wooded area all about there?

A. Yes.

Q. As a resort and vacation area? A. Yes.

Q. And Twain Harte is not an incorporated but it is an unincorporated village or town, isn't it?

A. Yes.

Q. And it has a County road as its main road?

A. Yes, it does.

Q. And then the other roads that lead to all the other houses, including your own, they are called secondary roads, are they? A. Yes.

Q. The road to your house is the same road as the road to other houses?

A. Well, not necessarily. The road to our house leads to about, oh, three or four other houses.

Q. I see. All right. And the premises are equipped with light and gas and all the facilities for living, is that so? A. Yes.

Q. Last year some time, you and your husband decided to offer that place for rent, did you?

A. Yes.

Q. And did you place it with some agent?

A. Yes.

Q. And who was the agent?

A. Jimmy Morrow.

(Testimony of Thelma L. Germany.)

Q. And later on were you advised by him that he had a tenant for the premises? A. Yes.

Q. And you do know that it was thereafter rented? A. Yes.

Q. What was the rent?

A. $125.00 a month.

Q. And was it paid? A. Yes.

Q. Do you know whether the rental was paid to and covering the date of August 27th of that year?

A. Gee, I don't know, you would have to ask Mr. Morrow about that. I have forgotten.

Q. He would know about that? A. Yes.

Mr. Gladstein: All right. That is all.

Mr. Schnacke: Thank you.

(Witness excused.)

JAMES MORROW

a witness called on behalf of the defendants being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: Q. Please state your name to the Court.

A. James Morrow.

Direct Examination

Mr. Gladstein: Q. Mr. Morrow, what is your business?

A. I am a real estate broker.

Q. Are you located in some particular area in this state?

(Testimony of James Morrow.)

A. Twain Harte, California, Tuolumne County.

Q. How long, approximately, have you been operating that business there?

A. About seven years.

Q. Some time in the late spring or early summer of last year did you have occasion to take over for rental purposes a house belonging to Mr. and Mrs. Germany? A. I did.

Q. And did you subsequently have occasion to rent those premises?

A. Actually the house was given to me for sale and the rental of the property was not—did not enter into the original agreement and I was approached by Mrs. Lee Kaplan, desiring to rent a cabin, that was secluded and quiet because her brother was ill with nerves and she wanted to be where they would be by themselves, and I showed Mrs. Kaplan, I believe, one or two cabins in the park property——

The Court: You are getting far afield. The question was, did you have occasion to rent it. Did you rent it?

A. I asked Mr. and Mrs. Germany by phone if they would consider renting their cabin.

The Court: You don't have to go into all of that. The only question is did you rent it?

A. Yes I did, your Honor.

The Court: Go ahead.

Mr. Gladstein: Q. When did you do that, Mr. Morrow?

(Testimony of James Morrow.)

A. Well, the rental date started approximately June 26, 1953.

Q. And the rental was paid for how long?

A. Mrs. Kremen paid—or Mrs. Kaplan paid the rental monthly in advance.

Q. And was the rent paid for—in other words, it was paid from a date in June to cover a date in July? A. Yes, sir.

Q. And then when the monthly rent was due in July she paid another month's rent?

A. Yes, sir.

Q. And there was some conversation about how long she was going to have the place was there?

A. Well, Mrs. Kaplan mentioned a minimum of three months, possibly four months.

Q. The rent was fully paid by her on August 27, the date she was arrested there, isn't that so?

A. Yes, the rent was paid if I remember correctly, up to and including the 25th of September.

Mr. Gladstein: (Speaking to spectator): Will you stand up, please? (A person in the Courtroom standing.)

Mr. Gladstein: I have asked the defendant, Shirley Kremen to stand.

Mr. Gladstein: Q. Do you recognize her as the lady to whom you rented the premises?

A. I do.

Q. She is the person?

A. That is the lady.

Mr. Gladstein: That is all.

(Testimony of James Morrow.)

Mr. Schnacke: Thank you.

(Witness excused.)

(Discussion between Court and counsel relating to further evidence to be presented.)

(Whereupon the matter was continued until 9:30 o'clock a.m. on April 6, 1954; further continued to 9:30 o'clock a.m. on April 13, 1954.)

[Endorsed]: Filed July 1, 1954.

[Title of District Court and Cause.]

EXCERPT OF VOIR DIRE EXAMINATION OF THE JURY

Monday, April 12, 1954

The Court: Members of the jury panel: the case on trial today is a criminal proceeding: United States of America against Shirley Kremen, also known as Lee Kaplan; Patricia Julia Blau, also known as Janet Conroy; Carl Edwin Rasi, also known as Carl Ross and Robert Edward Newman; Samuel Irving Coleman, also known as William B. Gordon; Sidney Steinberg, also known as Sid Stein and Joshua Newberg.

The Grand Jury for this District on September 16, 1953, filed in this court an indictment. And indictment is a charge or complaint setting forth the violation of federal statutes which the Grand Jury claims have been committed by the defendants.

This indictment or charge is in four counts, four separate charges made against the defendants in the indictment, which are in substance as follows:

(Reading indictment.)

That is the general nature, members of the jury panel, of the criminal charge that has been filed herein.

Each of these defendants has appeared and pleaded not guilty to the charges contained in the four counts of this indictment. That has put at issue all of the material allegations of this indictment. It is to resolve the question of the guilt or innocence of the defendants, and each of them, on the issues thus raised that the jury is to be selected here this morning.

Let me say to you in the first instance, members of the jury panel—and it should be borne in mind at all stages of the case—as in every criminal proceeding, by the filing of an indictment there is no presumption that the defendants or any of them are guilty of the charge made against them. To the contrary, it is traditional in our system of justice that the persons charged with a criminal offense are presumed to be innocent. That presumption exists in this case and it continues until such time as the Government convinces the jury beyond a reasonable doubt of the guilt of the defendants, and thus only may a verdict of guilty be found against the defendants, or any of them.

As in all criminal cases, members of the jury panel, the United States, being the plaintiff or prosecuting party, the Government is represented

by the United States Attorney's Office of the district. In this district the United States Attorney is Mr. Lloyd Burke, and the prosecution of this particular case is in the hands of Assistant United States Attorney Robert H. Schnacke and Richard H. Foster, who sit facing the jury box. All of the defendants except the defendant Steinberg are represented by attorneys Richard Gladstein and Norman Leonard, who sit at that table (indicating).

* * * * *

Mr. Gladstein: Would your Honor be good enough to inquire, if there is some evidence offered by the prosecution that connects any of the defendants with communism or the Communist Party, either now or in the past, would that influence the jury against such defendant and prejudice them against giving the defendant a fair trial?

Or, to put it differently, your Honor, if the fact were or ~~if it~~ were shown one or more of the defendants was a communist or had been, in view of Mr. Dolin's answer would he feel prejudiced against that defendant?

The Court: Well, perhaps I might say this to the jury: I have read to you in the indictment the specific charge that is made against each defendant.

One count charges the defendants with being accessories—that is the statutory form of that charge—in concealing or aiding this man Thompson against his apprehension by the authorities, and the defendants are charged with conspiracy to permit that offense. Likewise, there is a similar charge

with respect to harboring the defendant Steinberg. That charge is made against the other defendants. And also they are charged with conspiracy to do that.

It may be that in connection with the evidence in the case—I don't know. I don't know what the evidence is going to be in the case any more than you do—it may develop, as Mr. Gladstein has suggested, that the defendants may be members of the Communist Party or may be communists or may be members of other parties.

They are not charged in this proceeding with any such offense, if there be such an offense. They are charged only with the specific act that I have described several times to you in detail as charged in the indictment, and only that.

They might be Catholics or Protestants or Jews or Republicans or Democrats or members of all different sorts of organizations, and that may appear in connection with the matter. But they cannot be found guilty of the charge against them unless the jury is convinced beyond a reasonable doubt that they committed the offense that is charged in the indictment.

Now, are there any members of the jury who now feel they could not fairly try the defendants on the specific charge contained in the indictment, and give them a fair, square trial, decide the case upon the basis of the evidence and follow the Court's instructions, and generally give a square deal to the defendants? Is there anyone in the jury box, after the statement I have made to you, that has any doubt

about his or her respective ability to act and perform the honest duty of a juror?

I think I have pretty generally covered what you have in mind, haven't I?

Mr. Gladstein: Yes, your Honor.

The Court: Is there anything else that you have?

Mr. Leonard: Would your Honor examine our proposed questions 13 and 14 and consider whether he will put those to the jury?

The Court: Well, I think that my statement to the jury was general enough to cover this matter, Mr. Leonard. I don't think there is any need to elaborate on it.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

OPENING STATEMENT IN BEHALF OF PLAINTIFF

Monday, April 12, 1954

The Clerk: U. S. vs. Kremen, et al.

The Court: Do you wish to make an opening statement?

Mr. Schnacke: Yes, Your Honor.

Ladies and gentlemen of the jury, Your Honor please:

At this initial stage of the proceeding it is customary for the Government and for the defendants, if they so desire, to make what is termed an opening statement. The opening statement is not an

argument but it is an effort on our part to tell you what we consider the charges against the defendants to be and outline for you very briefly the evidence that we intend to present to you to substantiate the charges that have been made.

The evidence, as of course you are aware has to come to you through various witnesses who will take the witness stand and through various items of evidence that will be presented to you physically. The testimony of the various witnesses and the physical evidence will very probably be meaningless to you until everything is before you unless in advance we told you in general what the issues of the case were, what things we are trying to prove and demonstrate to you. With that as a preliminary explanation of the case, I think you will better be able to place in their proper roles, much as you would the items of a jigsaw puzzle, the various things that are going to be presented to you.

We can't give you the whole case at one time or from one witness or one piece of evidence. The case will be built up from a multiplicity of things, and all those things will have their proper place and are to be considered by you in your ultimate determination.

Some of you were sitting in the rear of the courtroom this morning when the Court read the indictment. In view of the fact that the indictment is the basis of the charge against these defendants, because that specifies specifically the things that the Government is obligated to prove, I don't think we

are over-emphasizing the indictment if I should read the significant parts of it to you again.

The first count of the indictment charges that:

"On or about the 14th day of October, 1949, Robert G. Thompson was convicted in the United States District Court for the Southern District of New York for the offense of wilfully and knowingly conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence; the aforesaid being in violation of Sections II, III and V of the Act of June 28, 1940, commonly known as the Smith Act."

And in the first count it is further charged that:

"On or about the 27th day of August, 1953, in the Northern District of California, in the vicinity of Twain Harte, Tulolumne County, California, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman, Sidney Steinberg and Carl Edwin Rasi, knowing that the offense aforesaid had been committed and that the said Robert G. Thompson had been convicted of committing the same, did receive, relieve, comfort and assist the said Robert G. Thompson in order to hinder and prevent his apprehension and punishment."

The second count of the indictment charges that:

"At a time and place to the Grand Jury unknown, in the Northern District of California and elsewhere, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman, Sidney Stein-

berg and Carl Edwin Rasi, unlawfully, wilfully and knowingly did conspire with each other and with divers other persons to the Grand Jury unknown.

"That the object of this conspiracy was to commit, in violation of Section III of Title 18 of the United States Code, the offense of receiving, relieving, comforting and assisting Robert G. Thompson, in order to hinder and prevent the apprehension and punishment of the said Robert G. Thompson, while the said defendants well knew that the said Robert G. Thompson had violated Sections II, III and V of the Act of June 28, 1940, commonly known as the Smith Act."

That pursuant to the conspiracy, certain overt acts were committed. His Honor read those overt acts to you this morning. I think it isn't necessary to read those again. It is sufficient at this time simply to say that an overt act is an act done in pursuance of the conspiracy.

Now, a conspiracy generally is something like a partnership. It is an agreement, but an agreement to do an unlawful thing. In this particular thing the agreement is to harbor Robert Thompson from apprehension and punishment.

The overt acts charged in the indictment are not themselves crimes. The crime is not in the commission of one or all of the overt acts. The crime lies in the illegal agreement and in the doing of some act, however innocent that act by itself might be, but in the doing of some act in furtherance of the illegal agreement.

That, then, is the gist of the second count.

Those two counts, you will notice, refer to the protection of Robert Thompson from apprehension and punishment. The third and fourth counts deal with the protection of Sidney Steinberg from apprehension and punishment, the harboring and concealing of Sidney Steinberg. The third count reads as follows:

"That on or about the 27th day of August, 1953, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman and Carl Edwin Rasi, with notice and knowledge of the fact that a warrant had been issued for the apprehension of Sid Stein, also known and named herein as Sidney Steinberg, did, in the Northern District of California, in the vicinity of Twain Harte, Tuolumne County, California, harbor and conceal, so as to prevent his discovery and arrest, the said Sid Stein, also known and named herein as Sidney Steinberg, for whose arrest a warrant had been issued pursuant to law by the United States District Court for the Southern District of New York."

The fourth count, again a conspiracy charge, charges:

"That, at a time and place to the Grand Jury unknown, in the Northern District of California and elsewhere, defendants Shirley Kremen, Carl Edwin Rasi, Patricia Julia Blau and Samuel Irving Coleman, unlawfully, wilfully and knowingly did conspire with each other, with Robert G. Thompson, named herein as a co-conspirator but not as a defendant, and with divers other persons to the Grand Jury unknown.

"That the object of this conspiracy was to commit, in violation of Section 1071 of Title 18, United States Code, the offense of harboring and concealing, so as to prevent his discovery and arrest, Sidney Steinberg, while said defendants well knew that a warrant for his arrest, under the name of Sid Stein, had been issued on the 20th day of June, 1951, pursuant to law by the United States District Court for the Southern District of New York."

And, again, the allegation is that, pursuant to the agreement, certain overt acts were performed.

That, then, is the charge laid against the defendants. Basically it is divided into two parts. The defendants tried to prevent the apprehension, arrest and punishment of Robert Thompson. They agreed to commit that crime. The defendants, with the exception of Sidney Steinberg, tried to prevent the apprehension and arrest of Sidney Steinberg, and they formed an unlawful agreement to commit that crime.

The elements of crime that you must find in order to find a verdict of guilty against all of these defendants will be outlined to you by the Court in detail. But generally we must show, I would think, that Thompson and Steinberg were fugitives from justice. We must show that these defendants knew or had reason to know of their fugitive status. We must show that with that knowledge they did something to accomplish the hiding and concealment, the assistance to the prevention of the punishment of Steinberg and Thompson.

And insofar as the conspiracy count is con-

cerned, we must show you from the evidence that there was a joint activity indicative of an agreement, of a conspiracy, between those persons charged here.

The evidence may well show that the conspiracy spread beyond, far beyond, the defendants that are sitting at this table. But the charge is against these defendants. While there may be other conspirators in the conspiracy itself, the conspiracy itself as charged as an offense is charged against the defendants we see here today.

Now, at this time it might be advisable, and before I start telling you of the evidence that we intend to present to you, it is advisable, I think, to caution you that what I am now telling you is not evidence. My comments are merely my expression at this time of what the evidence will show, and when I come to the final argument with you it will be my opinion as to what the evidence did show. But nothing that I can say to you should have any bearing upon your consideration of the evidence. My statements are not evidence.

Similarly, the statements of counsel for the defendants are not evidence. And, again, if any of the defendants choose to represent themselves, the statements that such a defendant make to you as an argument is not to be considered by you as evidence. Evidence is what you hear from the witnesses sitting on that witness stand and sworn to tell the truth. Evidence is what you get from the physical documents and physical things that will be presented to you after having been duly admitted into

this trial. Nothing else is evidence. The rest of it is simply argument or comment on the evidence and not to be considered by you except in that light.

Now, as to the evidence that will be presented in this case: We will present to you the records of the Federal Court for the Southern District of New York showing the conviction of Robert Thompson; showing his being released on bail after conviction and pending appeal; showing his failure to appear at the court at the time required of him; showing the issuance of a warrant for his arrest pursuant to his failure to appear, and showing that he did not appear in that Court until after he had been apprehended at Twain Harte in August of last year.

As to the defendant Sidney Steinberg, we will show you that a Grand Jury in the Southern District of New York returned an indictment against him, and that pursuant to that indictment a warrant was issued for the arrest of Sidney Steinberg. From June, 1951, when that warrant was issued, and until the time of his apprehension at Twain Harte, the defendant Steinberg did not appear in the courts in New York.

On August 26th of last year, the day before this arrest occurred, an F.B.I. agent visited that cabin at Twain Harte about which you will hear so much before this trial is over. He saw there a very innocent pastime going on: The Defendant Coleman, along with the fugitive Robert Thompson, playing Ping-pong. He saw Shirley Kremen at the premises on that occasion. He saw an automobile there. He had occasion to pass those premises at midnight on

the 26th. He saw no one about the cabin, lights on inside, two automobiles outside the cabin.

From sunrise on the 27th of August that cabin was kept under surveillance. No persons came from the outside area into that cabin during the period the cabin was watched. Persons came in and out of the cabin carrying on their normal daily activities, but no new people appeared. The two automobiles that had been sitting there at midnight the night before were still there.

About 1:05 on that date, just shortly after noon, the arrest was made in the cabin of the defendant Steinberg on the warrant issued against him in New York; of Robert G. Thompson on the process outstanding against him from New York; and against the other persons found in that cabin. The other persons were Shirley Kremen, Carl Ross and the defendant Coleman.

You will learn of the attempts made by the defendants Steinberg and Robert Thompson to change their appearance; of how far different they looked at the time of their apprehension at Twain Harte from the way they had looked when they left New York.

You will find from the evidence that the cabin was well settled, well prepared to harbor and conceal these defendants, these fugitives. The cabin was well secluded. The cabin was specifically designed, specifically selected for the task given to it. You will learn from the evidence that the cabin contained considerable paraphernalia designed specifically for the purpose of harboring these fugitives.

What sort of paraphernalia would that be? Well, in the first place, of course, food and clothing to provide these fugitives with the necessities of life. A substantial number of false identification documents for each of those persons in the cabin. None of the defendants was found there with any identification in his true name. Every person in that cabin had false identification documents. The accounting records, in rough form, to be sure, but accounting records indicating a well organized, well designed plan to get money, spend money, and to spend it for the purpose of protecting these fugitives. And other documents designed as directives to and from the persons in the cabin, telling them why it was necessary to conceal these fugitives, how they were to be concealed.

Documents designed to set up secret meeting places, secret meetings between persons not known to the other one. The whole arrangement, whole paraphernalia, whole design of an underground hiding place for these Communist leaders.

Now, the defendant Blau: Patricia Blau was not arrested in the cabin. A curious thing occurred when the agents came into the cabin. On examining some of the documents that they found there, they found a telephone number. That telephone number was determined to be the telephone number of the residence of Patricia Blau.

They found an automobile—an automobile registered in the name of Janet Conroy. Janet Conroy lived at the address where the telephone number

was listed. Janet Conroy, the evidence will show to you, is the defendant Patricia Blau.

There was also an indication that there was to be a meeting that evening between someone and the defendant Blau. The Federal Bureau of Investigation, you can be sure, didn't overlook that meeting. They were present. They followed the persons who met. They determined that the registered owner of the automobile found in the cabin was one of the people who made that meeting. They followed them for a time with this defendant apparently discovered that she was being followed, started tearing up documents and throwing them out of the car window, at which time the arrest was made.

The evidence will show that this defendant, Blau, had been present at the cabin and had made her contribution to this conspiracy.

Now, I want to say in this connection that these defendants are not charged with being Communists, and we have no intention of asking this jury to convict these defendants because they are Communists. The subject of Communism, however, must come up in this trial. I think it is probably already apparent to you why it must.

These defendants had no personal interest. Their interest in this illegal behavior of which the Government charges them to be guilty derived from their devotion to the Communist Party. The conspiracy was a Communist Party conspiracy to protect its leadership. These people were the pick of the people—these people—the ones designated by the Party to do the job of protecting Thompson

and Steinberg. They followed orders like good Communists.

To that extent, then, to show their motivation, to show why they so acted, to show their knowledge of the background and activities and the matter of the fugitive status of the people they were harboring, to that extent it will be necessary to discuss Communism, to discuss the connection of these persons with the Communist Party.

But I do not urge upon you—. Put it another way: I strongly urge you to bear in mind that Communists or not, these people are entitled to a fair trial; these people are entitled, as the Court will tell you, to a reasonable doubt, and whether you find them to be Communists or not is completely immaterial except insofar as it goes to their motivation. In order to find these defendants guilty you must find more than that they are Communists. You must find that they did the acts and had the unlawful agreement that the Government has charged against them.

Now, in the Communist Party a spade is rarely called a spade. Fugitives are never called fugitives. These fugitives are referred to as "Political Refugees," to put them in a class with other political refugees of history. You never talk about subversive organizations. You never talk about hiding people out. You talk about security measures. You never talk about these people as being fugitives from justice. You talk about them as being an "Unavailable Leadership."

You never talk about the forces of justice. You

never talk about the Federal Bureau of Investigation—you talk about the "Fascist Police."

And the ultimate aim, of course, of the Communist Party is "Democratization." And anybody who cooperates with the Government is a "Stool Pigeon."

These are all well-defined terms from the Communist lexicography. And these terms will appear from time to time throughout the trial. I define them to you now so you will understand the true meaning of those terms when they come to your attention.

This conspiracy, this plan or plot of the Communist Party to protect its leadership is not something that was working on a low level. The evidence I think will make it clear to you that the directions for this conspiracy came from the top in the United States and beyond.

That this conspiracy was effective, that it was well planned, that the members of the conspiracy worked hard to do their jobs, is adequately proved by the number of years these defendants were concealed from the processes of law.

The conspiracy, as the evidence will show, imposed upon the members of it, unquestioned obedience. If pursuant to the conspiracy these defendants were told to move, the evidence will show they moved. If they were told to change their names, they changed their names. "Change your job," you change your job, The individual is meaningless. The function of the Party and of the conspiracy here was, at the sacrifice of any individual, to conceal

these leaders from apprehension and punishment. That is why these secret meetings were set up that the evidence will show you. That is why, as you will agree from the evidence, there was this very, very strict and stringent inquiry into everybody that was to become an agent in this conspiracy.

The local organization that was set up in this area with the responsibility of the hiding of one of these fugitives for a certain period of time and the other for a relatively shorter period of time, was an organization known, for some reason or other, as "Mollie." That was the designation given to what they call an organization of unavailable leadership in this area. Sometimes it is designated as "No. 2" as distinguished from "No. 1," which would be the available or open leadership; that is, those members of the Party who did not have to go underground or did not choose to go underground would be the ostensible leaders, the No. 1, but the No. 2, that was the unavailable leaders. Those were the fugitives from justice, or at least that was the organization that dealt with the fugitives.

The evidence, I think, will make it clear to you that Sidney Steinberg was one of the members of "Mollie," or No. 2, in California. Carl Ross was another member. There were apparently two other members who are not here with us today.

But the function of this "Mollie" was quite clear. An examination of the financial records of it will make it clear that its major expenditures were for the protection of Mr. Steinberg. Major preparations were made to conceal this unavailable leadership.

Another function of "Mollie" as expressed by the Party was that the leadership should not merely be concealed and secured. The leadership must be a working leadership. That is, these underground fugitives were to continue their party work in spite of the fact that they were wanted by the "Fascist Police," and it was in order to permit them to continue that work that this conspiracy grew up.

Now, just who were the fugitives in this case? And, for that matter, who are the defendants?

In order to know what contribution each of them could make, and why he made his contribution, and why it was so important to conceal these fugitives, we will introduce evidence to show what the status was of these persons in the Communist Party.

Robert G. Thompson, who had been convicted of violating the Smith Act, had been the head of the Communist Party in the State of New York and one of the principal functionaries of the Communist Party in the United States.

Sidney Steinberg had been active in the New York area for the Communist Party for many, many years and finally had risen to the rank of Assistant National Secretary of the Communist Party.

Is there any wonder that the Party desired to protect that leadership?

The defendant Coleman had been active for years with the Party in New York. The defendant Ross had been active both in New York and in Minnesota, and had risen to the rank of State Chairman, I believe, in Minnesota.

The four I have mentioned—Thompson, Steinberg, Coleman and Ross—all worked together at one time or another in Communist headquarters in New York. They were all well acquainted with each other, well acquainted with each other's background and character, well acquainted with the status of the others in that organization. When Steinberg and Thompson became fugitives, Coleman and Ross could not help but know who they were and that they were fugitives. When they assisted them, they knew they were assisting fugitives from the law.

The defendant Blau was an active Communist Party organizer in Denver. She has met on many occasions, has attended conferences and meetings with the defendant Sidney Steinberg. She has on occasion indicated her familiarity with the Communist trials that were held on the east coast and from which Thompson and Steinberg were fleeing.

The defendant Kremen, the youngest of the defendants, is in a somewhat different category. She was a school girl radical down at a college in Los Angeles. She was an avid reader of The People's World, which gave considerable publicity to the Smith Act trial and to the fugitive status of these defendants. But so far as we know she has never held any important position in the Communist Party.

The evidence will show, none the less, that a highly responsible obligation was placed upon her by the Party. She and her husband, who is not charged here, but whom the evidence will show to be another of the conspirators, were charged with

the responsibility of hiding out the defendant Sidney Steinberg for a considerable period of time. She was the one who did much of the shopping, much of the caring for and housework around the Twain Harte cabin. She was the one that was used as the front at the cabin. I think you will be satisfied from the evidence that she knew what she was doing and that she knew why she was doing it.

Well, what, then, are the contributions of each of these defendants to this offense?

The defendant Coleman, up until the year 1951 was living openly in the City of New York with his wife and family. In 1951 he disappeared into the Communist underground. The evidence will show that Mr. Coleman in April of 1953 appeared in St. Louis, Missouri, not as Coleman—as William Gordon. And as William Gordon he bought an Oldsmobile automobile in April, 1953. In June of 1953 he turned that Oldsmobile automobile in on a brand new Hudson automobile—again, as William Gordon.

Thereafter, at various times William Gordon, in the company of Robert Thompson, the fugitive leadership, will be found around the country at various secluded spots: in the middle of the Ozark country, at the Lake of the Ozarks. Coleman, as Gordon, and Robert Thompson and two unidentified women will be found there on two occasions.

In August of 1953 Thompson will be found up in the northern reaches of Montana. There he uses the name, not Thompson—John Brennan, and as John Brennan he buys a fishing license. That fishing license will ultimately be found in the cabin on the

search that was made there. With John Brennan—Robert Thompson—in Montana is the defendant Coleman, again under the name of Gordon.

On August 20, 1953, seven days before the arrest, the automobile that Gordon had bought in St. Louis is found entering California in the little town of Dorris. There were four people in the automobile, two men and two women. On August 27th and on the day prior Coleman and Thompson are found together at the cabin at Twain Harte, together with some essential amounts of literature identifying each of them as somebody other than the person they are: identification for Thompson as John Brennan; identification for Coleman as William Gordon.

The defendant Carl Ross, known at one time as Carl Rasi, lived openly and under his true name in Minneapolis, Minnesota, until late in 1950. Then he, too, disappeared into the Communist underground, leaving a family behind him at the home in which he had resided.

Carl Ross we find again in July of 1953 over in Oakland when, after identifying himself as someone named Robert Newman, he buys a duplicating machine, a mimeograph type machine, over there and certain supplies, both of which are to be found at the Twain Harte cabin, along with a substantial amount of identification data, none of it bearing the name Carl Ross or Carl Rasi, but a substantial amount of it bearing the name Robert Newman. During the period of July and August Carl Rasi

will have been seen throughout the Twain Harte area on various shopping errands.

Defendant Steinberg is charged with the responsibility of harboring Robert Thompson. He disappeared from his home in New York in June of 1951, and we find him in July of 1953 there in Twain Harte pretending to be Joshua Newberg, teacher of the mandolin, claiming that Shirley Kremer here is his sister. And Shirley Kremen made the same claim, that she is the sister of Steinberg.

At the time of Steinberg's arrest, substantial numbers of false identification papers will be found identifying him as Joshua Newberg. Nothing to identify him as Sidney Stein or Sidney Steinberg. The cabin was obtained for him, as Mrs. Kremen told the real estate agent from whom she leased the cabin. As one of the leaders of "Mollie," or No. 2, it is quite clear the defendant Steinberg was the man in charge at the cabin, and that the cabin was there for the purpose of concealing both himself and, on his arrival, Robert Thompson.

The defendant Shirley Kremen was living with her husband, Kremen, in Los Angeles until the early part of 1952, at which time both of them left Los Angeles and appear in San Jose where they identify themselves not as Irving and Shirley Kremen, but as Lee and Dick Kaplan.

They take living accommodations in San Jose. Apparently there is a mysterious stranger living with them.

In June of 1953 Shirley Kremen announces that

she is leaving San Jose to go to the mountains to take care of a sick aunt. Well, of course, there is no sick aunt, but she does appear in Twain Harte looking for a cabin for her sick brother.

Defendant Kremen obtained the cabin, did the shopping, obtained servicing for the automobile, did, as you will hear, a variety of other things in and around the cabin up there to make the cabin livable and comfortable for Steinberg and Thompson.

The defendant Patricia Blau is also the Janet Conroy who lived and worked in San Jose. She is also the Patricia Blair who lived and worked in Denver, Colorado. She is also the Betty Miller who lived and worked in various places. And, as I pointed out, she is also an important functionary in the Communist Party.

Her contribution to the conspiracy was the acquisition of an automobile. She wouldn't drive the automobile. She made the salesman drive the automobile himself to a place where it could be picked up. She was never seen driving the car, and the car was found at the cabin when the defendant Blau is not there. Fingerprints taken at the cabin will indicate she had been there on occasions.

Well, that in general is the evidence that will show the contribution of each of these defendants to this well-defined, well-organized conspiracy to conceal from the apprehension of the Federal Government Steinberg and Thompson. I think the evidence of the conspiracy, the evidence of the acts done by these defendants in pursuance of the con-

spiracy, the knowledge of these defendants, the motivation of these defendants, will be ample to convince you that all of these defendants are guilty as charged in the indictment.

The Court: Do you want to reserve your statement?

Mr. Gladstein: Yes, I will reserve it, Your Honor. But I should like to address a motion to Your Honor, and for that purpose I ask the jury be excused.

The Court: Well, there are some matters I think we should take up between counsel and the Court anyhow.

Mr. Schnacke: Yes, Your Honor.

The Court: The jury will have a brief recess, and court will remain in session. Please bear in mind the admonition I gave you. The Bailiff will take you out to the juryroom.

(Thereupon the jury left the courtroom and motions were made and argued by respective counsel outside the presence of the jury.)

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

PROCEEDINGS ON MOTION TO SUPPRESS EVIDENCE

Tuesday, April 13, 1954

Before Hon. Louis E. Goodman, Judge.

(Court convened at the hour of 9:30 a.m. and the following proceedings were had outside the presence of the jury:)

The Clerk: United States versus Kremen, et al; motion to return seized property and motion to suppress evidence, further hearing.

Mr. Schnacke: Your Honor please, the Government agreed with the attorney for the defendants that we would provide the witnesses who were acquainted with the facts surrounding and leading to the arrest of the defendant, Patricia Blau. There are two witnesses who have information bearing upon that point, one of them having information concerning matters at the Twain Harte cabin, which were preliminary matters leading to the arrest. That agent is Roy Erickson.

The other agent who participated in and was present at the arrest is Agent Shedd. Both of those agents are present in court for the convenience of the defendants.

Mr. Gladstein: I will call Mr. Erickson if I may, your Honor.

ROY ERICKSON

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Roy Erickson.

Direct Examination

Mr. Gladstein: Q. Mr. Erickson, you are already identified in the record as the same Mr. Erickson who took the stand here yesterday and testified? A. Yes, sir.

Q. You have some personal knowledge as to the circumstances leading up to the arrest of the defendant, Mrs. Patricia Blau? A. Yes, I do.

Q. What is that knowledge?

A. While in Twain Harte, immediately following the arrests, I conducted a search of the person of Mr. Ross, of the two automobiles located there, and in those I found certain information which I had relayed on to San Francisco via radio.

Q. What information do you refer to?

A. The information found on Mr. Ross was contained in a small black notebook indicating words which I relayed in. The words——

Mr. Schnacke: I have the notebook here——

The Witness: Excuse me.

Mr. Schnacke: ——if the witness would care to refer to it, and we have no objection to its being offered in evidence at this time.

Mr. Gladstein: I have no objection to him look-

(Testimony of Roy Erickson.)

ing at the notebook if that will facilitate the testimony.

Mr. Schnacke: (Handing notebook to the witness.)

The Witness: A. The words appear on the third page of the notebook reading "George—" I think the abbreviation "Geo.—27".

Next line: "1. Meet Betty—S. J.—6:00 p.m.", and it is apparently the 13th or 3rd, "and Julian".

Also on the next page, page 4, was a list of numbers headed by the letter "J". The numbers are 7-0394. Home 5-9494, with a "3" in parentheses following that, and the word "out" following that.

The next line: "4-4285" with the word "out" following that.

The next line: "3-4538" with the word "off" following that.

Q. Is there a word in front of the figure 5?

A. Yes, there is a word before the 5. That is the number on the second line. It appears to be the word "use".

Q. Very well. Is that the extent of the information you obtained at the house in Twain Harte?

A. No. In examining the two automobiles, one was a 1950 Ford Sedan, brown or bronze in color, and it had on it a temporary registration, or suspensory sheet, I believe you would call it, reflecting that the car was registered to a Janet Conroy at 69 North 10th Street, San Jose, California.

Q. Anything else? A. No, sir.

(Testimony of Roy Erickson.)

Q. What was the information you relayed, you say?

A. I relayed that information to our San Francisco office.

Q. Let me ask you this, Mr. Erickson: Have you now told us the extent of the knowledge and information you have acquired concerning Patricia Blau, or any connection between her and the subsequent arrest that was made of her?

A. That is the extent of my personal knowledge, yes.

Q. You were present with other agents in the house, were you not? A. Yes, sir.

Q. Were any of them under your direction?

A. No, sir.

Q. Were you under someone else's direction at the time?

A. I was under the direction of the agent in charge, yes.

Q. Who was that?

A. Mr. William Hannan.

Q. Was he present during the occasion or during the time you are referring to in the house?

A. Yes, he was on the property. I advised him that we had found these things, and he simply directed that they be relayed on into San Francisco.

Q. I am trying to find out from you, Mr. Erickson, if there were any other matters of any kind whatever, to your knowledge, that you or other agents there obtained and transmitted on?

A. There was other comment to the effect that

another agent found an insurance policy in the house for the automobile which was registered to Janet Conroy.

Q. You don't personally know about that, but you know it came out that there was such a policy?

A. Yes, sir.

Q. That is a policy covering public liability or matters of that kind? A. I presume so.

Q. All right. Anything else?

A. No, sir.

Q. The answer, then, to my last question, covers both the knowledge and information of yourself and the other agents who were there with you on that occasion?

A. At the time of the arrest, yes, sir.

Q. Yes. Now, could you tell me what the time of the day was when you relayed this information on concerning these matters that you have given testimony about?

A. I would say between 2:40 and 3:00 o'clock. That is within twenty minutes after the time the individuals arrested were removed from the property.

Q. So what time of day was that?

A. They were taken from there approximately 20 minutes to 3:00.

Q. And this information that you have told us about, that was transmitted afterwards?

A. That was transmitted as soon as we could get the wheels in motion and remove him to San Francisco, yes.

(Testimony of Roy Erickson.)

Q. And that accounts entirely for the extent of your information about this matter, does it?

A. Yes, sir.

Mr. Gladstein: That is all, your Honor. Oh, just a moment. I am sorry. I have another question.

Q. I am correct, am I not, Mr. Erickson, you did not have nor did any of the agents who were with you at the house have any search warrant for the search of the premises, isn't that correct?

A. No, sir.

Q. When you say "No, sir", that is correct, is it not? A. That is correct, yes, sir.

Mr. Gladstein: That is all, your Honor.

Cross Examination

Mr. Schnacke: Q. Mr. Erickson, after the time of the arrest did you have occasion to check the telephone numbers listed to the address which appeared as the address of Janet Conroy on the automobile that was found at the cabin?

A. It was checked, yes.

Q. And do you know what that telephone number is?

A. That telephone number is Cypress 7-0394.

Q. And does the number "7-0394" correspond with the first number on the page headed by the letter "J"? A. Yes, sir.

Mr. Schnacke: That is all, Mr. Erickson.

(Witness excused.)

Mr. Gladstein: Mr. Shedd, please.

JOHN EDWARD SHEDD

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: John Edward Shedd.

The Clerk: Please spell your last name.

The Witness: S-h-e-d-d.

Direct Examination

Mr. Gladstein: Q. You are an agent of the Federal Bureau of Investigation, Mr. Shedd?

A. That's right.

Q. And you were in August of last year?

A. Yes, sir.

Q. Did you and other agents take into custody the defendant, Patricia Blau? A. Yes.

Q. Will you tell us at what time of day that was? A. The time of the arrest?

Q. Yes.

A. Approximately 8:25 on the evening of August 27th.

Q. At what time of day did you get directions or instructions to make such an arrest?

A. Approximately 4:00 o'clock on the same afternoon.

Q. And from whom did you receive such direction?

A. From my immediate supervisor.

Q. Who was that?

A. Mr. Clifford—Harry Clifford.

(Testimony of John Edward Shedd.)

Q. Where were those instructions given you?

A. I received them over the radio.

Q. Where were you at the time you received them?

A. On the city limits of San Francisco doing leg work.

Q. Do you know whether the instructions that were given you were relayed from the office in San Francisco or some other place?

A. They were relayed—my instructions came from Control—Control in San Francisco.

Q. Where were you at the time that you received these instructions, approximately?

A. Well, that is what I would have to say—approximately. I would say out on Geneva Avenue or some place like that.

Q. What were the instructions?

A. The instructions were to proceed to the immediate area of 69 North 10th Street, San Jose, and conduct a surveillance, physical surveillance of a person by the name of Patricia Blau.

Q. Was that the name that was used in the instructions, now? A. Yes.

Q. Was there any other information given you that would tend to identify or describe her?

Mr. Schnacke: Your Honor please, I haven't objected up to now, but I think this preliminary information of instructions is immaterial and hearsay, objectionable.

The Court: I will sustain the objection to the last question. I think that is far afield.

(Testimony of John Edward Shedd.)

Mr. Gladstein: Q. Then what did you do, sir?

A. I went to the—I of course immediately proceeded to San Jose and arrived there approximately five or ten minutes past 5:00 that same afternoon.

Q. I am not sure I understand correctly. Did your instructions tell you to conduct a surveillance or to make an arrest at that time?

A. At that time I was told to conduct a surveillance.

Q. All right. And will you tell us what you did thereafter?

A. Shortly after I arrived there I took up a position in the immediate area, and approximately 5:25, the defendant, Patricia Blau, was observed by myself leaving the residence at 69 North 10th Street, San Jose.

Q. Yes, sir. Then tell us what happened thereafter.

A. Well, when she left she was carrying a suitcase and coat over her arm, and she proceeded to walk north on 10th Street.

Q. Pardon me for interrupting. How did you know it was Patricia Blau at that time?

A. Well, prior to this I had observed and was instructed—or I had observed Patricia Blau in Oakland, California, previously in the year, and was told that the woman I had seen on the street here on North 10th Street in San Jose, which was the same woman I had seen in Oakland, was one and the same person.

(Testimony of John Edward Shedd.)

Q. All right, will you proceed?

A. And this defendant proceeded to walk north on 10th Street, and I observed her intermittently between North 10th Street until she finally stopped walking and was standing on the corner of 13th and Julian Street in San Jose. That was approximately 5:45 p.m.

After about fifteen minutes I observed a light green Chevrolet coupe drive up to that corner. I observed the defendant step from the sidewalk to the side of the car. I saw the defendant get into the car and I saw them drive off.

Q. What did you do then?

A. Well, I immediately started to follow the subject, and I watched them take various turns in and around the general area, which lasted for about twenty or twenty five minutes before the automobile headed north on 17th in the direction of Oakland.

The car continued along 17th until it reached Highway 21, where it veered off to the right and headed in a northeasterly direction.

The car continued along that road until it came to Livermore cutoff, and cut off on the way to Livermore, and proceeded as far as Banta cutoff near Tracy.

At about that point the car stopped, and then it made several U-turns and used a very devious means of getting around these back roads out there in an open field.

Q. What do you mean by that, sir?

(Testimony of John Edward Shedd.)

A. Well, the car would drive 200 yards, make a U-turn and come back in the opposite direction, stop, make a U-turn again and go back again in the other direction.

So finally the car proceeded out to Highway 50 again and headed toward Stockton. On the outskirts of Stockton the automobile stopped again and both the defendant and the other occupant got out, stepped into a restaurant there, and sat at a table near the window and proceeded to eat. This was approximately eight o'clock, or ten minutes to eight, I would say. I correct myself. Ten minutes to eight.

Q. Can I interrupt you again? Up to that point you had no instructions to place her under arrest?

A. I had received no instructions but I had been advised by Control of our position, and so forth.

At approximately five minutes past eight or so, both the defendant and her companion came out, got in the car, and proceeded to drive through Stockton, downtown Stockton, and in downtown Stockton they continued to make these U-turns and drive around in circles for about ten minutes before the car headed out on the Modesto Road.

At a point about three or four miles, the car turned over to a—turned to another highway, the Mariposa Road, and headed east on Mariposa Road.

At this point we were following the car and I observed pieces of paper, or what appeared to be paper, white objects, flying from both the left side

(Testimony of John Edward Shedd.)

of the car and the right side of the car, and as I got closer some of it was—when I got up real close to the car, some of it was coming right by our automobile.

As a result, I called Control again and advised them what the situation was, and shortly thereafter I was advised to make the—well, we were advised to make the arrest. So we immediately turned on the siren and lights and proceeded to halt the vehicle.

It was some time before the companion of the defendant observed the sirens of the three cars involved, but the car was finally stopped at the side of the highway approximately twelve miles out on Mariposa Road from Stockton, and at that point the defendant was placed under arrest.

Q. What did you place her under arrest for?

A. The senior agent in charge at that time in the group placed her under arrest for—I heard them say myself just the word "accessory after the fact", and I could not hear the rest of it because I was on the opposite side of the car and there was, of course, a little confusion at the time.

Q. Who was the senior agent in charge?

A. Mr. Charles Prelsnik.

Q. Of course you were in contact with the Control or central point?

A. Yes, I could hear them and they could hear me.

Q. Who was doing the communicating, you or Mr. Prelsnik?

(Testimony of John Edward Shedd.)

A. Well, it would vary, who was behind the car at the time.

Q. Sometimes you and sometimes he?

A. That is right.

Q. Did you yourself hear the instructions as to whom to arrest and on what charge?

A. Yes.

Q. I mean from the central office.

A. That is right.

Q. And what was that direction?

Mr. Schnacke: I object to that as being incompetent, irrelevant and immaterial, having no bearing.

The Court: I don't think this has any bearing on the matter. It is what was done. Doesn't make any difference what the instructions were.

Mr. Gladstein: Q. You had no warrant of arrest for the occupant of that car?

A. That is right.

Q. The same is true of all of you?

A. That is right.

Q. I take it it is also true none of you had a warrant authorizing a search of the occupants or contents of the vehicle?

A. That is correct.

Q. Now, you mentioned some pieces of paper. Did you ascertain what those were?

A. No. On that type of road and at the speeds that the cars were traveling it would be impossible to recover paper torn in small pieces.

(Testimony of John Edward Shedd.)

Q. You never did make any recovery of them and don't know what they are, is that correct?

A. That is correct.

Q. What happened at the time that you arrested—. By the way, did you arrest one or both of the occupants? A. We arrested one.

Q. And that was the defendant, Patricia Blau?

A. That is correct.

Q. And the other occupant was who?

A. Harvey Wilson Richards.

Q. You did not place him under arrest?

A. What?

Q. I say, you did not place him under arrest?

A. No.

Q. What did you do then at the time of the arrest?

A. Due to the location, we returned to the nearest city, which was Stockton. The companion of the defendant voluntarily returned with us. We drove to the resident agency there in Stockton with both the defendant and the companion, and at that point I stepped out of the picture. I wasn't in charge or anything and I had no further orders at that time, and that was the last time I observed the defendant.

Q. What time of day was that?

A. I could only guess at the time then. I am not sure as to what time that was, but it would be probably some time after nine o'clock in the evening—9:15 or 20.

Q. Prior to that time did the officers conduct a search of the person of the defendant?

(Testimony of John Edward Shedd.)

A. Would you say that again?

Q. Yes. Before you went off duty at nine o'clock did the officers conduct a search of Mrs. Blau?

A. The only search conducted of Mrs. Blau in my presence was the search of a handbag—a pocketbook.

Q. While you were present, then, no search was made of the automobile?

A. No search was made of the automobile at that time, shortly after nine o'clock.

Q. So that any search that may have been done would have occurred after you had gone?

A. No, I hadn't left, but my statement to you was that I did not see the defendant after 9:15.

Q. Oh, I am sorry. Now, were you present when a search of the car was made?

A. Yes, that is correct.

That was some time after you no longer—after the time you last saw the defendant?

A. That is right.

Q. Well, what time was it that the search was conducted?

A. Well, the search was conducted some time prior—about ten o'clock on that evening.

Q. Where had the defendant been taken?

A. I had no knowledge of where the defendant was.

Q. She wasn't released, was she?

A. Well, that is evident.

Q. I mean she had been taken in custody by some agent or agents? A. That is right.

(Testimony of John Edward Shedd.)

Q. Who conducted the search?

A. Search of——?

Q. The automobile.

A. I conducted the search of the automobile.

Q. Did you ask the defendant for permission to do so? A. No, I didn't.

Q. Or anybody? A. No.

Q. Did you take into your possession any contents were? A. Yes.

Q. Was an inventory made of what the contnest were? A. Yes.

Mr. Gladstein: Is that present, Mr. Schnacke? I think we can simply have counsel supply such inventory rather than have the witness try to remember from memory. I am satisfied the inventory would be more accurate, if that is all right with your Honor.

The Court: All right.

Mr. Gladstein: Q. I thought I had asked this question, but at the risk of repetition, it is correct that you had no search warrant to search the car?

A. That is right.

The Court: You said that already.

Mr. Gladstein: That is what I thought.

Q. One more question: Were you told whether or not a warrant for the arrest of Mrs. Blau had been obtained?

Mr. Schnacke: I will object to that as immaterial.

The Court: What did you say?

(Testimony of John Edward Shedd.)

Mr. Schnacke: I think it is immaterial whether this witness was told.

The Court: He said he had no warrant.

Mr. Schwartz: He said he had no warrant, so whether he was told there was a warrant or not doesn't seem to me to be material. I will withdraw the objection, though.

The Witness: Will you give me the question again?

Mr. Gladstein: Q. Yes. You have already told us that you yourself had no warrant to arrest her. I am simply asking you now whether you had been told there had been a warrant made, and if you were told you were to proceed under that authority.

A. I had no personal knowledge whether there was one in effect or not.

The Court: Anything else?

Mr. Gladstein: That is all except for the actual inventory of the contents.

Mr. Schnacke: Well, just a moment. Is there such an inventory?

(Colloquy inaudible to the reporter.)

Mr. Schnacke: There apparently is an inventory, your Honor, and we will attempt to supply it.

The Court: Anything else you want now?

Mr. Schnacke: No further questions.

Mr. Gladstein: That is all.

(Witness excused.)

[Endorsed]: Filed July 13, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA, Plaintiff,

vs.

SHIRLEY KREMEN, also known as LEE KAPLAN, et al., Defendants.

REPORTER'S TRANSCRIPT

Monday, April 12, 1954

Before Hon. Louis E. Goodman, Judge.

Appearances: For the Government: United States Attorney, by Robert H. Schnacke, Esq., and Richard H. Foster, Esq., Assistant U. S. Attorneys. For the Defendants: Gladstein, Andersen & Leonard, by Richard Gladstein, Esq., and Norman Leonard, Esq. [1*]

The Clerk: United States of America versus Shirley Kremen, et al., for trial.

The Court: Both sides ready?

Mr. Schnacke: Yes, Your Honor.

Mr. Gladstein: Yes, Your Honor.

(Thereupon a jury was selected and sworn.)

The Court: Mrs. Workman will be alternate juror No. 1 and Mrs. Lilly alternate No. 2.

We will take a recess until 2:30 this afternoon,

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

members of the jury. However, you should bear in mind, please, particularly those of you who haven't had jury service, that now that you have been sworn to try this case it becomes your duty not to discuss the case or anything about it among yourselves, nor are you to let anyone else upon any pretext address you in any manner concerning this case or any phase of it.

Likewise, it is your duty not to form or express any opinion concerning the case until it finally reaches your hands for decision.

Now, when we reassemble at 2:30, you will go to the jury room provided for you. When you leave now the Crier will show you the jury room, and when you assemble for the various sessions of court that is where your will go. Then you will [3] also go there during the several recesses.

The purpose of that is that we do not like to have the jury in the hallways while the case is in progress, and therefore we have provided a jury room where you will be at all times when you are not in court.

We will now take a recess until 2:30.

(Thereupon this cause was adjourned to the hour of 2:30 p.m. this date.) [3-a]

The Clerk: United States versus Kremen, et al., for trial.

The Court: Do you wish to make an opening statement?

Mr. Schnacke: Yes, Your Honor.

(Opening statement by Mr. Schnacke and various motions made by Mr. Gladstein reported but not transcribed at this time.)

Mr. Schnacke: Roy Erickson.

ROY L. ERICKSON

called as a witness on behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

A. Roy L. Erickson, E-r-i-c-k-s-o-n.

Direct Examination

Mr. Schnacke: Q. What is your occupation, Mr. Erickson?

A. I am a special agent for the Federal Bureau of Investigation, presently assigned to the San Francisco field office.

Q. Was that your occupation on August the 27th, 1953? A. Yes, sir.

Q. In the course of your employment did you have occasion to go to a cabin at Twain Harte, California, on that date? [4] A. Yes.

Q. What time did you arrive at that cabin?

A. I arrived in the area of the cabin about 5:00 a.m.

Q. With respect to visibility, what was the situation at that time?

A. When I entered the cabin area it was still

(Testimony of Roy L. Erickson.)

dark. By the time I was situated dawn was just beginning to break.

Q. Mr. Erickson, at a later time did you return to the area of the Twain Harte cabin and make certain measurements for the purpose of drawing a diagram of that area?

A. Yes, on March 12th, 1954.

Q. Would you identify these papers for me (handing documents to the witness)?

A. These are three sheets of paper which I used to draw three different things in the area where the cabin was located from measurements which I had obtained on my trip there March 12th.

Mr. Schnacke: May the three pages identified by the witness be marked as Government's Exhibit next in order?

The Clerk: As one exhibit, Mr. Schnacke?

Mr. Schnacke: As one exhibit, yes.

The Clerk: Do you wish them marked for identification or entered into evidence, Mr. Schnacke?

Mr. Schnacke: In evidence.

The Clerk: Plaintiff's Exhibit 1 introduced and filed [5] into evidence.)

(Whereupon three sheets of paper identified above were received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Schnacke: Q. Now, will you identify that document, please, (handing document to the witness)?

A. This consists of three photostatic copies, one

(Testimony of Roy L. Erickson.)

of each of the three charts. However, they have been reduced to half size.

Mr. Schnacke: If Your Honor please, I have enough of the photostatic copies to which the witness has just referred to supply one to each member of the jury. I have supplied one to counsel for the defense and I have one available for Your Honor. It may be of assistance in following the testimony of this witness as to his activities at the cabin and in the cabin area. May a copy of these be given to each member of the jury?

The Court: Any objection?

Mr. Gladstein: I don't have any objection.

(Thereupon photostatic copies of Plaintiff's Exhibit No. 1 were distributed to the jury.)

Mr. Schnacke: Q. The first page of the diagram to which you have referred represents what, Mr. Erickson?

A. The first page represents generally the lot on which the cabin was located. It shows the general—the specific [6] dimensions of the lot there, to my limited ability, the shape of the lot.

It shows the roadway running below the lot, which is at the base of the hill. It shows the entrance driveway from this roadway into the lot on which the cabin was located, and a front roadway on the front terminus of the lot which goes by the area on this side of the hill but does not enter the cabin area as such.

Q. Both above and below the upper road you have labeled "wooded hillside". Does that wooded

(Testimony of Roy L. Erickson.)

hillside extend to the left and to the right of the place where it is noted?

A. Yes. The land on all sides of the cabin, to the left, to the right and above it, were wooded. The land below it, immediately below it on the property, is wooded; but below what is noted as the "lower road" is a small valley which is not wooded.

Q. Now, you have designated only one cabin or building other than the outhouse building on this diagram. Within the area included by the diagram are there any other buildings?

A. Within the area included by the diagram there was none.

Q. What are the nearest adjacent buildings by direction and distance from the cabin here?

A. The upper road goes to a cabin which would be west or to the right of the diagram as looking at it. There is a cabin probably 100 to 150 feet beyond the end of the roadway, as [7] shown. There is also a small cabin on the lower road west of the property, or to the right of the map, and that again is probably 100 feet or so from the edge of the map.

Q. Are there any other cabins in the immediate vicinity?

A. No, not in the immediate vicinity.

Q. You have testified that on the morning of August 27th, at about five o'clock a.m., you came into this cabin area. By referring to this diagram, into what part of the area did you come?

A. I came into the area above the upper road, or at the top of the chart as depicted. That is a

(Testimony of Roy L. Erickson.)

wooded area with some heavy or large stone, boulders. The trees are reasonably large. They are limited in number, though. And I was in the area immediately above the road and at times on the road itself.

Q. Were you alone on this occasion?

A. No, I was with four other agents.

Q. And where were the four other agents located with respect to yourself?

A. We were stationed as near to each other as we could be without being observed; that is, either behind the next boulder or behind the next tree.

Q. From the place where you were stationed, what parts of the cabin could you observe?

A. From where we were stationed the hill is reasonably high [8] so we were above the cabin as such. We could observe what would be mostly the southwest side of the cabin and the southeast side of the cabin. We could observe the two sides clearly together.

Q. To clarify the designation of the sides, you mean the side nearest the top of the page as the southwest side and the left side of the cabin as the southeast side, is that correct?

A. That is right.

Q. Did you observe the parking and game area, as it is designated here?

A. Yes. As I have noted here, below the cabin is marked "wooded". That is wooded in the sense that there are several trees there. However, like above, they are limited in number.

(Testimony of Roy L. Erickson.)

The cabin itself is in a cleared area which is sort of terraced. The small lines drawn from the left to the right from the entrance driveway, they are supposed to depict a rise in the land or a terrace, and that entire area is cleared and flattened by the terracing. I could observe that entire terraced and cleared area at all times.

Q. And from your location, and after the visibility was sufficiently good, could you observe the outhouse?

A. Yes, the outhouse I could observe at all times.

Q. And could you observe the entrance driveway?

A. Yes. We could look down a good percentage, I would say one third of the way down the driveway itself.

Q. Approximately how far were you from the cabin itself?

A. I would estimate roughly 100 feet.

Q. And how long did you stay in that position?

A. I was in that position from about five o'clock in the morning until immediately after one o'clock. About, my time, about 1:04 p.m.

Q. You were in the area along there above the front road in the portion labeled "wooded hillside", then, from about five o'clock in the morning until about one o'clock in the afternoon?

A. That is right.

Q. And you were accompanied by four other agents during all that time, were you?

A. Yes.

(Testimony of Roy L. Erickson.)

Q. Now, at what hour was the visibility sufficiently good for you to observe the cabin and the adjacent area?

A. Well, shortly after I arrived, I would guess about 5:30 or thereabouts, it was possible to see through the clearing below; but in the wooded area it was around about six o'clock before it was clear enough to see other than reasonably good sized forms such as the size of a person or larger.

Q. Commencing at the time that the visibility was sufficiently good for you to see in the entire area, will you tell us who was the first person that you observed in the vicinity of [10] the cabin?

A. We saw no human activity whatsoever from the cabin proper or in the environs around it until about 9:30 when a man emerged from the entrance of the cabin, which I would say is on the left of the chart or on the west side of the cabin. He emerged from that doorway to the front yard, as I have it marked, or the terraced, cleared area.

Q. That is in the upper left hand part of the cabin where the label is "entrance"?

A. That is right.

Q. Is that man in the courtroom?

A. No, he is not.

Q. Did you later determine who that man was that you saw coming from the door at that time?

A. Yes. That man later——

Mr. Gladstein: Just a moment. I think the question has been answered by the witness saying

(Testimony of Roy L. Erickson.)

"Yes". I suppose if he wishes to ask him further questions to establish a proper foundation——

The Court: I think I will sustain the objection.

Mr. Schnacke: Q. You did later determine who that man was? A. Yes, sir.

Q. Did you see him later that day?

A. Yes. [11]

Q. Was he identified to you at that time?

A. Yes, sir.

Q. By whom?

A. He was identified to me at that time—. Well, I should say later than that time. At the time of an arrest. I had to my satisfaction identified him as Robert Thompson.

Q. Did he ever acknowledge his identity as Robert Thompson to you?

Mr. Gladstein: Just a moment. I want to move to strike that answer as being a conclusion. No foundation. Non-responsive answer to the question.

The Court: He said to his satisfaction. That is his conclusion. That may go out. You can ask him how he determined who he was.

Mr. Schnacke: Q. On a later occasion did Robert Thompson identify himself as Robert Thompson in your presence? A. Yes.

Q. And when was that?

A. That would be, in my presence, to me, the following morning.

Q. And where was that?

A. That was in Alcatraz Penitentiary.

Q. So the man that you saw coming out of the

(Testimony of Roy L. Erickson.)

entranceway you have described here, on a later occasion identified himself to you as Robert Thompson? A. Yes, sir. [12]

A. I will show you a color photograph and ask you if you can identify the man in that photograph?

A. Yes, sir. This is the man who on the occasion of the taking of this picture identified himself to me as Robert Thompson.

Q. Is that the man that you saw emerge from the cabin at ten o'clock that morning?

A. At 9:30, yes.

Q. And I will show you a black and white photograph and ask you if you can identify that?

A. This also is a photograph taken of Robert Thompson on the following day when he identified himself to me as such.

Mr. Schnacke: I will ask that the color photograph be received in evidence as Government's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 2 introduced and filed into evidence.

(Whereupon colored photograph referred to above was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Schnacke: And I will ask that the black and white photograph be admitted into evidence as Government's exhibit next in order.

The Clerk: Plaintiff's Exhibit 3 introduced and filed into evidence.

(Testimony of Roy L. Erickson.)

(Whereupon black and white photograph referred [13] to above was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Schnacke: Q. When Robert Thompson came out of the cabin at 9:30 that morning how was he dressed?

A. When he came out at 9:30 he was dressed in a pair of brown pants and a blue or dark blue type of sweater.

Q. What did you observe him to do after he came out of the cabin?

A. He came out of the cabin with a fishing rod, fly rod, and walked over to the approach of the entrance driveway in that cleared area and practiced casting with the rod for about ten minutes, at which time he laid the rod down on a small table which was set in the yard immediately in front of the entrance, and returned to the cabin.

Q. Did you observe him come out of the cabin after that time?

A. Shortly after he came out, about five minutes after, or about 9:45 a.m., a woman came out of the cabin and sat in an armchair which was situated near the entrance that the first person came out of and that this person came out of, and it was situated near the table I previously mentioned. She sat in that chair and appeared to be drawing or writing.

Q. Do you see that woman in the court room?

A. Yes.

Q. And where is she?

(Testimony of Roy L. Erickson.)

A. She is the woman sitting at defense counsel table in the [14] gray suit and black hat.

Mr. Schnacke: Identifying the defendant Shirley Kremen.

Q. And how long did she stay in the yard?

A. She sat in this chair for probably 15 minutes, and returned to the cabin, entering in the same entrance that she emerged from.

Q. And who next did you see in the area?

A. While she was sitting in the chair a man came out dressed in a pair of brown pants and sat on the ground off of the lowest terrace right by the entrance from which he and the other two emerged. He sat there for just a few minutes, and went back in about the same time as Mrs. Kremen went in.

Q. And do you see that man in the courtroom?

A. Yes.

Q. Which of the——

A. That is the man at the end of the counsel table, on the opposite side, in the light gray suit.

Mr. Schnacke: Identifying the defendant Carl Ross. [15]

Q. After Carl Ross came out of the cabin, whom did you next see?

A. The next person was again Mrs. Kremen, who emerged about a quarter after ten, and at that time she came out carrying clothing, apparently washed clothing, which she hung on a clothesline stretched from the corner of the cabin nearest the entrance from which everyone had emerged to

(Testimony of Roy L. Erickson.)

what I have marked as the outhouse. The clothing was hung on that line and she immediately returned to the cabin.

Q. Did you observe what kind of clothing it was, as to whether it was man's clothing or women's clothing?

A. It was man's clothing, and a dish towel or some type of a towel.

Q. After 10:15 whom did you next observe at the cabin?

A. About 10:30 another man came out of the cabin and he just walked around the yard shortly, for a short time, and returned. He used the same entrance as the others had used, and he was dressed in only a pair of yellow swimming trunks or shorts of that nature.

Q. Do you see that man in the courtroom?

A. Yes.

Q. Which man in the courtroom is he?

A. That is the man at the counsel table, the opposite side from me, in the middle with the brown suit and the glasses.

Q. Identifying the defendant Coleman? [16]

A. Yes.

Q. After the defendant Coleman came out of the cabin, whom did you next see?

A. They were walking in and out of the cabin from then on several times, all four of those individuals. I did not keep an accurate record of their exits and entrances.

The next person that came out came out about

(Testimony of Roy L. Erickson.)

noon, twelve o'clock. That is, a person other than I had already seen emerge from the cabin, and he emerged from the same entrance that the others had been using.

Q. What time was that?

A. That was just about noon, twelve o'clock.

Q. Prior to the emergence of this new party at twelve o'clock, what had been the general nature of the activity of the other persons that you had seen other than as you have already identified them?

A. They came out as I would say people would normally come out of a place and talk among each other, relax on their various terraces or in chairs. There was another chair, a straight back chair of the type I am sitting on, which was also on that side of the cabin on the terrace.

Q. Then at noon you saw another person come out. Do you see that person in the courtroom?

A. Yes, that is the person on the opposite side of the counsel table, in the blue suit and the gray sweater. [17]

Q. Identifying the defendant Sidney Steinberg?

A. Yes.

Q. How was Sidney Steinberg dressed on that occasion?

A. When he came out he was dressed in a pair of pants only, a brown type of pants, khaki style, I think.

Q. Mr. *Harrison,* I will ask you if you can identify the photograph I am showing you now.

A. Yes, sir, this is a photograph of Mr. Stein-

(Testimony of Roy L. Erickson.)

berg that I took of him in the cabin at the time of the arrest on that day, August 27th.

Mr. Schnacke: I will ask that the photograph of the defendant Steinberg be marked next in order.

(Whereupon the photograph of Sidney Steinberg was received in evidence and marked Defendant's Exhibit No. 4.)

Mr. Schnacke: Q. In that photograph is the defendant Steinberg dressed as he was on the first occasion and that you saw him on August 27th?

A. Yes, sir.

Q. When Steinberg came out of the cabin what did he do?

A. Mr. Steinberg came out of the cabin and he pulled a chair up to the table I have mentioned as being near the entrance. He came out of the same entrance as the rest, and he sat at the table, apparently writing or drawing. He sat there for a considerable time, 15 to 20 minutes, during which time others [18] were outside or entered or left the cabin on the cleared area. After the 15 or 20 minutes or about a quarter to 20 minutes after twelve he got up and went back into the house.

Q. All of them returned to the house?

A. All of them at various times returned to the house, yes, sir. None of them ever left the property as such.

Q. Calling your attention to about five minutes after one on that day, who was present in your yard at that time?

A. Do you say about five minutes after one?

(Testimony of Roy L. Erickson.)

Q. Yes.

A. About five minutes after one, Mr. Thompson, Mr. Steinberg were together in the yard. Immediately before that time all five of those I had seen come from the cabin were sitting in the yard around the table. What they were doing I don't know, other than they appeared to be talking.

Q. Then all of them other than Thompson and Steinberg returned to the house?

A. The other three returned to the house just before 1:05, yes.

Q. At about 1:05 did you get instructions from your superior?

A. Yes. Earlier than that, actually about 12:45.

Q. Pursuant to those instructions what did you do?

A. Pursuant to those instructions I had been relaying the information that we were observing to an agent in charge of the operation. Those instructions were relayed by means of a [19] two-way radio, which is called a handi-talkie. We had been observing the people through binoculars and relaying the details as we observed them. About 12:30 we relayed the information that, to our satisfaction, two of the individuals were people we were satisfied as fugitives. We had relayed the information about the others coming in and out and so forth.

About 12:45 we received instructions to stand by, not to move, but to be prepared to assist approaching party, which was approaching by automobile. We were told that there would be an arrest effected,

(Testimony of Roy L. Erickson.)

that we would have to take the two who were there that we were satisfied were fugitives in our minds. We were told that we should also be prepared and that we would effect an arrest of all the parties there, since it was apparent from what we had reported——

Mr. Gladstein: I am going to object to this as a conclusion.

The Court: Yes, the statement, "Since it was apparent", from that point may go out.

Q. (By Mr. Schnacke): In any event, about 12:45 you received certain instructions and thereafter you took certain action, did you not?

A. Yes.

Q. What action did you take?

A. At the time automobiles could be seen coming in the [20] entrance driveway we were instructed to leave our cover positions on the upper road and on the wooded hillside and move down to the cleared area and assist in effecting the arrest of the people of the cabin.

Q. Did you do that? A. Yes, sir.

Q. About what time of day was it that you converged on the cabin?

A. According to my time it was 1:04.

Mr. Schnacke: Is this a convenient time to adjourn?

The Court: All right. I think perhaps we might adjourn until tomorrow morning. You can step down.

Members of the jury, I have some motions, legal

(Testimony of Roy L. Erickson.)

matters to dispose of with the attorneys tomorrow morning earlier. So you need not come at the usual time of ten o'clock but instead we will resume the trial so far as the jury is concerned at 10:30 in the morning. So please return here tomorrow morning at 10:30 and in the meantime bear in mind the admonition I have given you.

The Court will recess until 9:30 tomorrow morning.

Will you see that you get all 12 of those diagrams from the jury and return them to the Clerk?

(Whereupon an adjournment was taken until 9:30 a.m. Tuesday, April 13, 1954.) [21]

The Clerk: United States vs. Kremen, et al, motion to return seized property and motion to suppress evidence, further hearing.

Mr. Schnacke: If your Honor please, the Government has agreed with the attorney for the defendants that we would provide the witnesses who were acquainted with the facts surrounding and leading to the arrest of the defendant Patricia Blau.

There were two witnesses who have information bearing upon that point, one of them having information concerning matters at the Twain Harte cabin which were preliminary matters leading to the arrest. That agent is Roy Erickson. The other agent, who participated in and was present at the arrest, is the Agent Shedd. Both of those agents are present in court for the convenience of the defendant.

(Testimony of Roy L. Erickson.)

(Further proceedings upon motions reported but not made a part of this transcript, upon instructions of counsel.)

(Recess.)

ROY L. ERICKSON

resumed the stand as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows: [23]

Direct Examination—(Continued)

Mr. *Erickson*: Q. Mr. Erickson, when we left yesterday you had reached the time of about 1:05 p.m., and as I recall it you were on the hill, had received instructions to converge on the cabin, and you observed automobiles approaching the cabin through the driveway, is that correct?

A. Yes.

Q. And that was, then, at approximately 1:04 p.m., on August 27th, is that right?

A. Approximately, yes.

Q. Now, will you tell us what you did from that time on in connection with these defendants?

A. As I observed the automobiles coming up the driveway, I dropped what I was carrying, namely, the handi-talkie, and I came down the hillside, the wooded area, to the parking area, which is on the map.

Just as I came down over and dropped into the parking area, the first automobile came into the area from the driveway. Immediately, the agent in

(Testimony of Roy L. Erickson.)

charge jumped out of the automobile, issued the command to everyone present that we were agents of the F.B.I., and that those on the premises were under arrest.

At the time two of them, Mr. Thompson and Mr. Steinberg, were standing in the parking area or cleared area in front of the house. The other three were inside the house and were immediately removed to the outside. [24]

Then, after they were removed to the outside, individual agents examined—they assumed charge of the prisoners independently. I personally assumed charge of Mr. Rasi who emerged from the entrance where, as I spoke of yesterday, the people were entering and leaving. I asked him to face the building and raise his hands up against the walls of the building. I immediately, so-called frisked him. I removed from his pockets the contents, and then I placed handcuffs on his hands with his hands to the front.

At the completion of that I asked him to rest easy, stand easy, or sit wherever he wanted until the other details were taken care of.

When all of the people had thus submitted to arrest, the agent in charge made the announcement to them, which is the usual announcement by a police officer, that the people were being placed under arrest. He announced that there were warrants for Mr. Thompson and Mr. Steinberg, and he announced that we would have to hold the rest on charges of harboring.

(Testimony of Roy L. Erickson.)

Q. You stated that you conducted an examination or search of the defendant Carl Rasi?

A. That's right.

Q. And what did you find on his person?

A. Very little. There were——

Mr. Gladstein: (Interposing) Just a second. I note an exception, if Your Honor please, on the ground that the search [25] and any seizure thereafter was illegal and improper, and therefore I make the objection to the question.

The Court: Overruled.

The Witness: There were a few papers in his pocket and a small notebook.

Mr. Schnacke: Q. How was he dressed at that time?

A. At that time he was dressed in only a pair of trousers. I believe they were brown trousers.

Q. I will show you a notebook and ask you if you can identify that notebook? A. Yes.

Mr. Gladstein: Excuse me. May I have a running objection to this line of inquiry, if Your Honor please, upon the ground stated?

The Court: You mean—. This is from the defendant Rasi?

The Witness: Yes.

The Court: Same ruling.

The Witness: A. Yes. This is the notebook I took from the pockets of Mr. Ross.

Mr. Schnacke: I will ask that this notebook be introduced in evidence as Government's exhibit next in order.

(Testimony of Roy L. Erickson.)

Mr. Gladstein: I object for the same reason, Your Honor please.

The Court: Same ruling. [26]

The Clerk: Plaintiff's Exhibit 5 introduced and filed into evidence.

(Whereupon small notebook referred to above was admitted into evidence as Government's Exhibit No. 5.)

Mr. Schnacke: Q. I will show you a sheet of paper and ask you if you can identify that sheet of paper?

A. This also is a sheet of paper I took from the pocket of Mr. Rasi.

Mr. Schnacke: I will ask that the sheet of paper just identified by the witness be introduced in evidence as Government's exhibit next in order.

Mr. Gladstein: Same objection.

The Court: Well, what is the objection? Only on the ground of the search—unlawful search? I haven't seen it. What is the material?

(Document handed to the Court.)

The Court: Oh.

Mr. Gladstein: I will add, concerning my objection, the objection as to the incompetency, irrelevancy and immateriality, if the Court please.

The Court: I will overrule the objection.

The Clerk: Government's Exhibit 6 introduced and filed into evidence.

(Whereupon the sheet of paper referred to above admitted into evidence as Government's Exhibit No. 6.) [27]

(Testimony of Roy L. Erickson.)

Mr. Leonard: In addition to the objection by Mr. Gladstein, Your Honor, may the record show at this time we move to suppress Exhibits 5 and 6 on the grounds that they were illegally obtained from the defendant. May that motion be deemed made?

The Court: It may be deemed made and denied.

Mr. Schnacke: Q. I will show you a sheet of paper with envelope attached and ask if you can identify those documents?

A. These were also taken from the pocket from Carl Rasi, with the sheet of paper being in the envelope at the time.

Mr. Schnacke: I will ask that the documents identified by the witness be introduced in evidence as Government's exhibit next.

Mr. Leonard: We make the same objection, Your Honor, and renew our motion to suppress as to Exhibit 7.

The Court: It may be admitted. Objection overruled.

The Clerk: Plaintiff's Exhibit 7 entered into evidence.

(Whereupon sheet of paper with envelope attached was admitted into evidence and marked Government's Exhibit No. 7.)

Mr. Schnacke: If Your Honor please, may the exhibits just introduced as taken from the defendant Carl Ross be exhibited to the jury at this time?

The Court: Well, can't you read them?

Mr. Schnacke: Yes, I can.

(Testimony of Roy L. Erickson.)

The Court: Unless you want to display the physical [28] connection and want to hold them up, I don't see it is necessary taking up time passing each one around and having each juror read each one separately.

Mr. Schnacke: All right. The first document introduced is Government's Exhibit 5, a little black notebook with a number of pages throughout the book. I will read all of the material that appears in the notebook, insofar as I can read it. Some of it——

Would it be proper, Your Honor, for the witness to read it? I think the witness is better able to decipher some of the language than I am.

The Court: I am not prohibiting you from exhibiting the book if it becomes necessary, but if you take a writing that requires reading by the jury and pass it along, it takes a very long time.

Mr. Schnacke: Yes, I appreciate it does.

The Court: Counsel on either side can simply call attention to what they wish.

Mr. Schnacke: Q. Will you read the contents of the notebook to the jury, please.

A. Page 1 appears to read, line 1, "With Geo."— apparently abbreviation for "George." "8/10," or August 10, I assume.

The next line reads, "1) Williams Cab."

The next line: "From 3rd to 8."

Next line: —I don't know what the first word would be. [29] The second——

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. Would the first word be "Weber?"

A. Maybe "Weber is Vaugn." And the next line: "Da Pazton (woman)."

"2) Other—O.K."

Next line: "3) See Geo—18th."

Next: "Tues—12:00."

Mr. Schnacke: Q. Seems to be "Tuesday" abbreviated and the number abbreviation for "12:00 o'clock," is that right?

A. Probably. Next line: "San Mateo."

Next line: "S.E. corner."

Next line: "5th—(Park)."

In the corner are my initials and the date that I took the evidence.

The Court: Are there many pages of this?

Mr. Schnacke: No, Your Honor. There are about eight or ten pages is all. The significance of the book lies only in two pages. Now, if there is no objection we can read those two pages and mark those in red, and may leave the balance of the book unread.

The Court: You can call attention to anything you want at this time and Mr. Gladstein, if you want to call attention to anything, you can do so.

Mr. Schnacke: Q. Will you read page 4 of the book, Mr. Erickson? Is that the page headed "George—27th?" [30]

A. Page 4, first line, "George" abbreviated, "27th."

Next line: "1) Meet Betty—SJ."

(Testimony of Roy L. Erickson.)

Next line: "6PM" and either "13th" or "3th." The "M" and the "1" appear to be run together. "& Julian."

Q. Would you read the next page?

A. The next page, page 5, first line: "J."

Second line, numerals "7-0394—home."

Next line appears to read, "Use 5-9494(3) out."

Next line: "4-4285 out."

Next line: "3-4538—off."

Q. Now, would you read the page captioned "Public Library" or "Pub. Lib," which appears to be page 11.

A. That page reads: "Pub Lib"—public library abbreviated.

"8 PM." The next line reads: "October 17-24-31.".

Next line, abbreviation for November "7-14."

The next line——

Q. Would that be "Novek?"

A. It seems to be. I would presume it is "N-o-v-e-p," meaning "November copy—Newsweek."

The next line is apparently, "They—New Yorker."

The next line: "Do you mean—" I believe.

The next line: "Steve Novak."

Next line: "Yes. You must be Miller."

"Miller" is on the following line.

Q. Would you read—just a moment. [31]

Mr. Schnacke: Government's Exhibit 6 appears to be a grocery list. I can read that, I think.

"Five dozen eggs. 10 pounds—" No, I can't read it.

Can I see the original of No. 6?

(Testimony of Roy L. Erickson.)

"Five dozen eggs. 10 pounds of—" something indecipherable. "Five pounds onions. Garlic. Carrots. One-half ham butt, 8-9, 5 pounds boneless chuck. 2 pounds margine," and in the margin, "cheese, salami, liverwurst."

To the right there is, "oil, vegetables (canned), juice, fruit, 4 pounds coffee, tea, 2 pounds Bisquick, 3 milk, 2 buttermilk, chicken."

And in the lower right-hand corner there are Mr. Erickson's initials.

Government's Exhibit 7, as taken from the defendant Rasi, reads as follows:

"Dear Jim: "8/24

"Enclosed is note to my Betty. In open envelope is some material which have written. If you care to read and comment, you are welcome. Please seal before you send off.

"The person on this end of arrangement is being instructed to break off with your lady until he makes certain other arrangements. As previously agreed, contact from your end to be [32] with S. with whom we are in contact. S will explain further and make necessary further arrangements.

"Regards,

"Jess,"

and in the lower right-hand corner is annexed Mr. Erickson's initials and the date August 27, 1952.

Mr. Schnacke: Q. Following your search of Mr. Carl Ross, what did you thereafter do?

(Testimony of Roy L. Erickson.)

A. Following my search of Mr. Ross, I then assisted in fingerprinting each of the prisoners and checking the fingerprints of Mr. Thompson and Mr. Steinberg with a copy, which is on what we call an identification order, that commonly seen in Post Offices and bulletin boards, and so forth, with people for whom we are——

Q. Well, without regard to that, what did you specifically, in connection with the defendants or in connection with Robert Thompson, do?

A. With Robert Thompson I check his fingerprints, that is all.

Q. I see. What did you do thereafter?

A. Then after checking the fingerprints of Mr. Steinberg, I photographed each of the defendants.

Q. And what was the next thing you did in connection with the defendants or the cabin?

A. Then I went into the house in order to see what there was relating to this matter. I entered the house at the entrance [33] the people had been using. I entered what would be the kitchen on the chart.

Q. Well, let's stop there for just a moment. The second and third pages of Government's Exhibit 1 represent a diagram that you have made of the interior of the cabin at which the arrests occurred, is that right? A. Yes, sir.

Q. And the ladies and gentlemen of the jury have copies of those diagrams before them. The second page appears to be labeled "First floor" and the third page to be labeled "Second floor."

(Testimony of Roy L. Erickson.)

A. That's right.

Q. With regard to that diagram, as necessary to explain your testimony, will you tell us what you did after you entered the house?

A. I went through the utility room into the kitchen. I noticed the two stoves with food on them, food on the cabinet above the sink, food in the refrigerator—the normal type of food, bacon, eggs, milk, and so forth.

From there I went into the next room, which apparently would be a dinette or something of that type, where there was a table and chairs. In the corner was a cupboard containing dishes. On the table were two boxes, one large box and one smaller box.

The larger box—both boxes were open. The larger box [34] contained a mimeograph machine, the model and make of which was a Print-o-matic, and in the other box were stencil copies and paper for use on the mimeograph machine, along with the necessary ink.

There was also clothing on the chair. Along the wall there was some fishing equipment.

I then went into the living room. I noted the items of furniture which are shown on the chart: Chair, radio, davenport, and a television set. There were also minor things like a footstool and end table. There was a music rack in the corner near the radio.

I noticed there were clothes on most of the items. There was also some clothes on the floor. There was

(Testimony of Roy L. Erickson.)

under the desk a portable—Royal portable typewriter. In the desk were many volumes of phonograph records. There were also many papers.

From there I went on up the stairway to the second floor. That is shown on the third page of the chart.

At the head of the stairway was a closet. It was well filled with clothing. There was a box, paper box on the floor of the closet. It contained a considerable number of papers of various types. I thumbed through the papers.

Then I went into the bedroom, which would be the bedroom above the living room, or at the head of the chart.

Those closets contained clothes, principally men's clothes. [35] They contained several types of suitcases—army bags. There was also one suitcase in the closet with several documents in it and papers.

At the foot of the bed were three cardboard boxes, all containing papers which I looked through. On the bed was a brief case, an expansion type brief case. It was quite filled with papers and documents.

Also, there was a suitcase, a brown suitcase, on the bed, and it too contained documents. There was clothing a few items, on the bed.

On the dresser was a smaller cardboard box containing several documents. On top of it was a small zipper type brief case containing papers and documents. And just lying on top of the dresser was a pair of keys on one ring.

I crossed over into the other bedroom, which

(Testimony of Roy L. Erickson.)

would be above the kitchen side of the house, and this was the smaller one of the two. That contained clothing in the closet. It appeared to be essentially lady's clothing.

There was clothing also on the bed, and there were toilet articles on the dresser. Below the dresser was a standard model typewriter rather than a portable—Remington typewriter.

I then went back downstairs and went out through the porch entry, noting the porch entry had, on the porch were—I think there were four sleeping-bags, or sleeping mattresses and bags. [36]

I went down the stairway and walked over to the parking area where the two automobiles were. One automobile was a green, light green Chevrolet. I looked in the glove compartment quickly to see if there was anything of importance there.

There were some identifying documents showing the car registration at apparently the present time, and an earlier registration.

At the end of the parking area, near the outhouse, was a 1950 bronze-colored Ford. I looked in the glove compartment of that, also, and there were a couple of papers and a temporary or suspense receipt as registration.

Mr. Leonard: If Your Honor please, before counsel puts the next question, may I move to strike that last answer of the witness on the ground that there has been no showing that there has been any process issued for the rambling search which the wit-

(Testimony of Roy L. Erickson.)

ness just described he undertook. I move to strike on that ground.

The Court: The motion will be denied.

Mr. Schnacke: Q. After examining the automobiles, what did you then do?

A. I went over to the agent in charge and pointed out to him the general things I had observed. Principally mentioned the documents in these various boxes and suitcases. I told him that they appeared to involve considerable——

Mr. Gladstein: Just a moment. I am going to object to [37]. that as hearsay.

The Court: Sustained. All he can testify is just what he did, not what he said he did.

Mr. Schnacke: Q. After making your report to your superior, what did you then do?

A. Following that, I was then instructed to prepare to take that material back with me to San Francisco.

Q. And pursuant to those instructions, what did you do?

A. I placed the boxes and suitcases and the material from the two cars in an automobile that was provided for me and went back to San Francisco with them.

Q. Prior to the time you returned to San Francisco did you hear any conversation between the special agent in charge or any of the other agents on the premises and the defendant, or any of them, with respect to the property in the cabin?

A. The agent in charge——

(Testimony of Roy L. Erickson.)

Mr. Gladstein: Just a moment. I think that can be answered with "yes" or "no," if Your Honor please.

Mr. Schnacke: Q. I asked if you heard any such conversation? A. Yes.

Q. And between whom was that conversation?

A. That was an announcement by the agent in charge to those we had held as prisoners.

Q. Would that represent all of the defendants with the [38] exception of the defendant Blau?

A. Yes, sir.

Q. And also Robert Thompson?

A. Yes, sir.

Q. And what was the announcement that the special agent in charge made?

A. The announcement was that we were concerned with the material in the cabin. He asked if any of the defendants would identify any of that which was theirs and gave them a chance to answer. They all at that time stood mute.

He then explained to them that they would be taken into San Francisco. It would be a ride of somewhere around five hours. Since they were dressed mostly in just, the men in a pair of trousers and no uppers on, he suggested they may want to get in more comfortable clothes because they would be taken immediately to the United States Commissioner.

He pointed out to them that up until that moment it was their privilege to say nothing. He asked them again if they would identify anything there, or

(Testimony of Roy L. Erickson.)

specify anything they wanted us to take care of. At no time did any of them tell him what was theirs.

Q. In any event, irresponsive at, or at the time that announcement was made, you were in the presence of the special agent in charge and the five persons that had been arrested?

A. Yes, we were all grouped there. [39]

Q. Were you in a position to hear if any reply had been made? A. Yes.

Q. And you heard no reply at that time?

A. No, sir.

Q. What did you do? You said you had instructions in connection with the property that was obtained on the premises. What did you do in connection with that property?

A. As soon as the prisoners were removed there and an automobile could be brought in——

Q. About what time of day was that. [40]

A. They departed about 20 minutes to three. And we immediately brought in an automobile, placed the boxes and suitcases containing the documents into the automobile, along with the material from the two cars, and drove to San Francisco with it.

Q. I show you a document and ask you if you can identify that document?

A. This is one of the registration forms that was in the glove compartment of the Chevrolet.

Mr. Schnacke: I will ask that that document be

(Testimony of Roy L. Erickson.)

received in evidence as Government's Exhibit next in order.

Mr. Leonard: We object to it for the reasons heretofore stated, and move to suppress it on the ground it was illegally seized.

The Court: Overruled. It may be admitted.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Thereupon document referred to above was received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Schnacke: Q. I will show you three documents clipped together, and ask you if you can identify those documents?

A. Yes. They were—these are three documents found in the glove compartment of the Ford. [41]

Mr. Schnacke: I will ask that they be received in evidence as Government's Exhibit next in order.

Mr. Leonard: We make the same objection, Your Honor, and move to suppress upon the same ground.

The Court: Overruled. It may be admitted.

The Clerk: Plaintiff's Exhibit 9 introduced and filed in evidence.

(Thereupon three documents referred to above were received in evidence and marked Plaintiff's Exhibit No. 9.)

Mr. Schnacke: Q. I will show you a document enclosed in a cellophane container and ask you if you can identify that document?

A. This was also in the glove compartment of the Ford.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: I will ask that that document just identified by the witness be received in evidence as Government's Exhibit next in order.

Mr. Leonard: Same objection, Your Honor, and same motion to suppress.

The Court: Same ruling.

The Clerk: Plaintiff's Exhibit 10 admitted and filed in evidence.

(Thereupon document in cellophane container was received in evidence and marked Plaintiff's Exhibit No. 10.) [42]

Mr. Schnacke: Q. I show you a small yellow piece of paper and ask you if you can identify that document?

A. This was also in the glove compartment of the Ford.

Mr. Schnacke: I will ask that the document just identified be received in evidence as Government's Exhibit next in order.

Mr. Leonard: Same objection, same motion to strike. And I might also point out in connection with the documents, there is no showing of any connection with any of the defendants, and it is incompetent, in addition to the grounds we have urged upon the Court.

The Court: Well, I will overrule the objection. I don't know what the weight of the testimony is at this time.

The Clerk: Plaintiff's Exhibit 11 admitted and filed in evidence.

Mr. Gladstein: Excuse me, Your Honor?

(Testimony of Roy L. Erickson.)

The Court: I say, I am simply admitting the document in evidence. I don't know what the weight of it is.

(Thereupon yellow piece of paper referred to above was received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Schnacke: Q. I will show you a photostat of a document and ask you if you have ever seen the original of that photostat? A. Yes.

Mr. Schnacke: May the photostatic copy be marked [43] Government's Exhibit for identification and bear the number next in order?

The Clerk: Plaintiff's Exhibit 12 marked for identification.

(Thereupon photostat referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Mr. Schnacke: Q. Mr. Erickson, do you know where the original of that document is, or do you know—did you ever have in your possession the original of that document? A. Yes, sir.

Q. And what was done with the original of that document?

A. I returned that to one of the attorneys for the defendants with the automobile.

Q. So that the original of that document is no longer in the possession of the Government, is that correct? A. Yes, sir.

Q. Now, where did you first see the original of that document?

A. It was on the window of the Ford.

Q. Of the Ford automobile seen at the cabin?

(Testimony of Roy L. Erickson.)

A. Yes, sir.

Mr. Schnacke: I will ask that Government's Exhibit 12 for identification, be received in evidence at this time.

Mr. Gladstein: Same objection, Your Honor.

The Court: Same ruling. Admitted. [44]

The Clerk: Plaintiff's Exhibit 12 admitted into evidence.

(Thereupon document previously marked Plaintiff's Exhibit No. 12 for identification was received into evidence.)

Mr. Gladstein: I meant to add the same motion to suppress, Your Honor.

Mr. Schnacke: May this be marked for identification, to bear the next number?

The Clerk: Plaintiff's Exhibit 13 marked for identification.

(Thereupon document referred to was marked Plaintiff's Exhibit No. 13 for identification.)

Mr. Schnacke: Q. I will show you Plaintiff's Exhibit 13 for identification, and ask you if you have ever seen the original of that document?

A. Yes, sir.

Q. And where did you first see the original of that document?

A. In the glove compartment of the Chevrolet, at the cabin in Twain Harte.

Q. Did you take possession of the original of that document? A. Yes; sir.

Q. And what did you do with it?

(Testimony of Roy L. Erickson.)

A. I returned that with the automobile to one of the attorneys for the defendants. [45]

Q. So that the original of that document is no longer in the possession of the Government, but has been returned to the defendants, is that correct?

A. Yes; sir.

Mr. Schnacke: I will ask that Government's Exhibit No. 13, for identification, be received in evidence.

Mr. Gladstein: Same objection and same motion, if Your Honor please.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 13 admitted in evidence.

(Thereupon document previously marked Plaintiff's Exhibit No. 13 for identification was received in evidence.)

Mr. Schnacke: Could I have Exhibits 8 to 13, please?

May I at this time read to the jury, Your Honor, the exhibits just introduced by the Government?

Government's Exhibit 8 is a State of California 1952 registration.

"Year 1952. Car registration, Anna May Sheppard, 2201 Derby Street."

There is engine number. It describes the make of the car as Chevrolet. Six cylinders, Two-door coupe. The date issued is June 4th.

"First sold 7/50. Class AK."

And there is a tab number. "Year model, 1950." There is a [46] code number, and the automobile

(Testimony of Roy L. Erickson.)

license number appears to be 7B86733. And the fees paid appear to be $1.00.

Signature of Anna May Sheppard on that document, and the usual material on the reverse side.

Government's Exhibit 9, Mr. Erickson said he found in the 1950 Ford.

First there is a little notation, a slip of paper reading "Indiana Lumberman's 5/10/5—$500 MP."

Under that "Nathan Citron, Agent. San Jose, $65."

Under that, "San Jose Ford Sales Company," a bill form. "375 South Market Street, San Jose," with a telephone number, and date August 6th, 1953.

"Sold to Janet Conroy. Address, 69 North Tenth Street."

Various columns. Under "Articles" it reads, "Cash $200". The numbers are written across it, "3G1606," and under that it says, "a/c 113".

In the lower left-hand corner it reads "Olsen", and in the lower right-hand corner it reads, "$200," and it bears Mr. Erickson's initials and a date.

The third document in that exhibit, the caption is "Retail Buyers Order and Invoice, San Jose Ford Sales Company, 375 South Market Street, San Jose, California. Salesman, W. J. Olsen. Date, August 6th, 1953. Purchaser, Janet Conroy. Address, 69 North Tenth Street, San Jose." [47]

"Enter my order for one 1950 Ford V-8, Custom Club Coupe, color bronze."

There is a rubber stamp "Guarantee" written across it.

(Testimony of Roy L. Erickson.)

The "cash delivered price" is shown to be $1,125. There is a notation, "replace timing gear". The total is shown to be $1,125, sales tax $39.38, license or license transfer $1.00, or a total price of $1,165.38.

There is a deposit of $200. "No trade".

"Cash on delivery $965.38. Total down payment $1,165.38. Insurance $65. Total $1,230.38."

Bears the signature "Janet Conroy", plus other printing on the form that does not appear to be material.

On the reverse of that there are certain writings in pencil that appear to have no meaning to me. I can read them. Looks like, "M. H. O. R. H., 156413, body BH 72 B, GB2L14303."

Then there appears to be a subtraction of 965 from the $1,000, leaving $35, and under that the number "34".

Government's Exhibit 10 is a policy of holder's identification: "Indiana Lumbermen's Mutual Insurance Company. Insured, Janet Conroy. Address, San Jose, California. Auto name, Ford. Motor number HORH 156413," which I think is the same that was on the reverse of that last page.

"Expires August 7, 1954." There is a space for signature, but no signature appears. And the policy number is "5565769." It recites that, "This card identifies the bearer and [48] authorizes acceptance collect—" well, identifies the policy holder.

On the reverse of it there are instructions in case of accident: Name of the insurance company, and on the cellophane folder in which it is attached is

(Testimony of Roy L. Erickson.)

the name "Nathan J. Citron, insure today, be sure tomorrow, 93 East San Antonio, San Jose, California," and a telephone number.

Government's Exhibit 13 is a registration certificate covering a 1950 Chevrolet, two-door coupe. The engine number is HAA786026. License number 7B86733. There is registration to Gilbert G. Byrne, 169 Inner Circle, Redwood City. License transfer fee of $1.00, and signature of Gilbert G. Byrne on the reverse side. The usual printed material contained on a registration certificate.

Government's Exhibit 12 is a document that reads on the reverse "Temporary permit. Attach to lower right-hand corner of windshield."

On the face of it it says, "Suspense receipt, State of California, Department of Motor Vehicles, Division of Registration."

It appears to bear the seal of the State of California. A number in the upper right-hand corner. Covers a Ford 8 engine BORH156413, and shows the registered owner as "Janet Conroy, address 69 North Tenth Street, San Jose." License number 3G1606. Year 1953. State of California check mark and [49] a column saying CK.

There are three places, "cash, check, money order", and the "check" is checked.

"Remarks Bu. No. 8." In the lower left-hand corner is a cashier's certificate with the initials "J. M." and the name appears to be indecipherable. "Number 09. San Jose 016," and the date typed in,

(Testimony of Roy L. Erickson.)

"8/13/53," and also bears Mr. Erickson's initials and the date.

Government's Exhibit 11 is a little sheet of yellow paper: "The car is in the parking lot down the street. Use it as much as you like but be careful," and the "be careful" is underlined.

"Good luck, Janet". It bears Mr. Erickson's initials and the date.

Is this a convenient time to adjourn, Your Honor?

The Court: Do you have other documents to identify?

Mr. Schnacke: Yes, Your Honor, there will be considerable more.

The Court: Well, we will meet again at 2 o'clock, members of the jury. Please return at 2 o'clock and bear in mind the admonition of the Court.

(Thereupon this cause was recessed to the hour of 2 o'clock p.m. this date.) [50]

ROY L. ERICKSON

resumed the stand as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Mr. Schnacke: Q. Mr. Erickson, on August 27th of last year, on the day of the arrest about which we have been speaking, did you have occasion to photograph the cabin and the surrounding area?

A. Yes, sir.

(Testimony of Roy L. Erickson.)

Q. I will show you five photographs and ask if you can identify those photographs?

A. Yes, these are five photographs I took of the area outside of the cabin.

Mr. Schnacke: I will ask that the five photographs be introduced in evidence as Government's Exhibit next in order. May each of the photographs be separately numbered? I think that is as convenient as sub-lettering them.

(Whereupon the photographs referred to were received in evidence and marked respectively Government's Exhibits 14, 15, 16, 17 and 18 in evidence.)

Mr. Schnacke: Q. Mr. Erickson, I will show you People's [51] Exhibit No. 14 and ask you what that photograph depicts, and if you wish to refer to your diagram and tell where you were and what area is covered by that diagram you may do so.

A. This is a photograph taken of the hill and property on which the cabin was located from the open area at the bottom of the hill of which I previously spoke.

Mr. Schnacke: The photograph is relatively large and I think if I hold it before the jury they will be able to observe it.

The Court: Pass it if you wish.

Mr. Schnacke: At some later time it may well be the jurors would care to look at it, but at this time I think it is sufficient to give a general impression of the area from that photograph. If any juror cares to look at it more carefully, he or she may

(Testimony of Roy L. Erickson.)

raise his or her hand and we shall present it for examination.

Mr. Schnacke: Q. Mr. Erickson, I will show you Government's Exhibit No. 15 and ask you what that picture depicts and from what part of the property that picture was taken?

A. This is a photograph of the cabin taken from the ridge at the edge of the parking and game area.

Mr. Gladstein: Your Honor, may I ask, has it been testified when these photographs were taken?

Mr. Schnacke: Q. You have testified they were taken on [51] the day of the arrest, is that right?

A. That is right.

Q. I show you Government's Exhibit No. 16 and ask you what that picture depicts and where you were when you took that picture?

A. This is a photograph looking up the end of the entrance driveway into the parking and game area at the two automobiles and a ping pong table on the parking and game area.

Q. Would you give me the same information with respect to Government's Exhibit No. 17?

A. This is a photograph of the cabin and the clearing in front of it taken from the position we were in on the upper ridge and above it.

Q. That is from the position where you were from sunrise that morning up until the time of the arrest, is that what you mean?

A. That is correct.

Q. And looking toward the cabin?

(Testimony of Roy L. Erickson.)

A. That is right.

Q. Would you give me the same information with respect to Government's Exhibit No. 18?

A. This is a photograph from the entrance driveway looking into the cabin. It is taken from, oh, 25 or 30 feet down the driveway.

Mr. Erickson, you testified that on your initial [52] examination of the house you found certain containers with documents in them, that you examined them briefly on that occasion, and that you did something with them later on. What was the action that you took with respect to those documents and those containers at a later time?

A. I took them into our office and placed them in a tall wardrobe-type cabinet in the room to which I am assigned. The cabinet was placed there for those documents and contained nothing else, and was kept under lock and key and still is.

Q. Who had the key to that?

A. I had one and there is an office key.

Q. Did they remain in that cabinet until they were turned over to me? A. Yes, sir.

Q. Mr. Erickson, I will show you what appear to be two keys and ask you if you have ever seen those before?

A. These are the two keys I mentioned as having been lying on the dresser in the bedroom above the living room.

Mr. Schnacke: I will ask that those keys be marked Government's Exhibit next in order for identification only.

(Testimony of Roy L. Erickson.)

(The keys referred to were thereupon marked Government's Exhibit No. 19 for identification only.)

Mr. Schnacke: Q. I will show you a document and ask you [53] if you can identify that document? A. Yes, this is a document——

Mr. Gladstein: Just a moment.

Mr. Schnacke: I will withdraw that question.

Mr. Schnacke: Q. I will ask where you first saw that document?

A. I first saw this document in the expansion briefcase I previously mentioned as having been on the bed, in the bedroom above the living room.

Mr. Schnacke: I will ask that the document just described be received in evidence as Government's exhibit next in order.

Mr. Leonard: Objected to, if Your Honor please, on the ground it is incompetent, irrelevant and immaterial. There is no foundation laid and there is no showing that any process or warrant was issued to constitute a legal search.

The Court: Do you propose to connect this up?

Mr. Schnacke: I propose to connect up the name, Your Honor, to the name of one of the defendants found at the cabin. This is a document found at the cabin and a document which the Government believes is one of the instrumentalities used in the commission of this offense.

The Court: I will overrule the objection.

(Testimony of Roy L. Erickson.)

(The document referred to was thereupon received in evidence and marked Government's Exhibit No. 20.) [54]

Mr. Schnacke: Q. I will show you a card and ask you when and where you first saw that card, if you have seen it before?

A. I saw this in the expansion brief case where the last exhibit was found.

Mr. Schnacke: I will ask that that card be received in evidence as Government's Exhibit next in order.

Mr. Leonard: Same objection as to the previous exhibit, Your Honor.

The Court: Same ruling.

(The card referred to above was thereupon received in evidence and marked Plaintiff's Exhibit No. 21.)

Mr. Schnacke: Q. I will show you another card and ask you if you have ever seen that before and if so when and where?

A. This also was found in the expansion brief case in which the previous two exhibits were found.

Mr. Schnacke: I will ask that that card be received in evidence as Government's exhibit next in order.

Mr. Leonard: Same objection as to the previous exhibit, Your Honor.

The Court: Same ruling.

(The card referred to above was thereupon received in evidence and marked Government's Exhibit No. 22.) [55]

(Testimony of Roy L. Erickson.)

Mr. Schnacke: May I briefly describe the exhibits that have just been introduced into evidence? Government's Exhibit 20 is on a Treasury Department form captioned "Application for Social Security Account Number." The applicant is shown as Robert E. Newman, an address in Berkeley, and it bears what appears to be a signature, Robert E. Newman, with miscellaneous information as required in the form.

Government's Exhibit 21 is a Social Security card bearing Social Security Account No. 56-146-7492, bearing the name Robert E. Newman, 2001 Alston Way, Berkeley, California.

Government's Exhibit 22 is a library card on the free Public Library of New Haven, bearing the name Robert E. Newman, 195 Sherman Avenue.

Mr. Schnacke: Q. Mr. Erickson, I will show you a group of cards and ask you if you have ever seen those before, and if so when and where?

A. Yes, these were found in a zipper brief case on the dresser in the bedroom above the living room side of the house.

Mr. Schnacke: I will ask that those cards as a group be received in evidence as Government's exhibit next in order.

Mr. Leonard: We make the same objection, Your Honor. They are not connected up with any of the defendants and there is no showing of the process by which they were seized. It is incompetent, irrelevant and immaterial.

The Court: I asked counsel if they were going

(Testimony of Roy L. Erickson.)

to be [56] connected up. If they are not, they will be stricken.

Mr. Schnacke: These involve a different name and I will assure Your Honor that they will be connected up.

The Court: Overruled.

(The cards referred to were thereupon received in evidence and marked Government's Exhibit No. 23.)

Mr. Schnacke: Q. I show you a small card and ask you if you have ever seen that before, and if so when and where?

A. Yes, I found this in the drawer, the center drawer of the desk which is shown on a chart to be located in the living room on the first floor of the house.

Mr. Schnacke: I offer that card in evidence as Government's exhibit next in order.

Mr. Gladstein: I make the same objection. May it be deemed also that our motion to suppress is addressed to this and the preceding exhibits?

The Court: Yes, you may have a continuing motion to that effect.

Mr. Gladstein: Thank you.

(The card referred to was thereupon received in evidence and marked Government's Exhibit No. 24.)

Mr. Schnacke: Q. I show you a small green piece of paper and ask you if you have ever seen that before, and if so when and where?

A. Yes, I found this in the same drawer of the

(Testimony of Roy L. Erickson.)

desk in the [57] living room as I found the previous exhibit.

Mr. Schnacke: I will ask that that be introduced in evidence as Government's Exhibit No. 25.

Mr. Gladstein: The same objection and motion, Your Honor.

The Court: Very well, same ruling.

(The piece of green paper referred to above was thereupon received in evidence and marked Government's Exhibit No. 25.)

Mr. Schnacke: With Your Honor's permission I will describe to the jury the items just introduced.

Government's Exhibit No. 23 are printed cards. There are five cards. They all read the same:

"Joshua Newberg, teacher of violin, mandolin, 1224 Windemere Avenue, Menlo Park, by appointment, DAvenport 3-2604."

The same text appears on each of the cards.

Government's Exhibit No. 24 is another Social Security card bearing No. 54-948-3623, and the name of Joshua Newberg, 1514 MacDonald Avenue, Richmond 5, California.

Government's Exhibit No. 25 is a State of California Resident Citizen Fishing License made out in the name of Josh Newberg, 1224, and the street looks like "W-e-n-d-e-r-a" Menlo Park, which I take it is meant to be Windemere, but it does not appear to be that. It sets forth a description: Color of eyes, sex and a signature, which appears to read Joshua Newberg. That [58] is a sporting fishing license that expired December 31st, 1953.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. Mr. Erickson, I will show you a notebook and ask you if you have ever seen that before, and if so when and where?

A. Yes, this is a notebook that I found in the expansion brief case on the bed in the bedroom above the living room.

Mr. Schnacke: I will ask that that notebook be received in evidence as Government's exhibit next in order.

Mr. Gladstein: I make the same objection, if Your Honor please, and the same motion.

Mr. Schnacke: This document, if Your Honor please, I think speaks for itself, being found under the circumstances under which it was found at the cabin.

Mr. Gladstein: I do not understand that remark and I ask that it be stricken, if Your Honor please. It is not a legal argument.

Mr. Schnacke: I will withdraw the remark, if Your Honor please, if it disturbs counsel.

The Court: I will overrule the objection.

(The notebook referred to above was thereupon received in evidence and marked Government's Exhibit No. 26.)

Mr. Schnacke: If Your Honor please, I would like to read this exhibit to the jury. I will say to you first it is a small notebook with what appears to be ball-point pen writing [59] on both sides of many pages and with certain inserts connected with it, and I will apologize for stumbling on it because some of the writing is not too legible.

(Testimony of Roy L. Erickson.)

On the first page it appears to read: "Arne Kerr," a big letter M for Margaret, and under that a small c for Charley in parenthesis, and No. 3774. Under that "SW" and what apparently was corner, "cor." only the c appears to be visible now.

Mr. Gladstein: Your Honor, I am going to object to the "apparently." It is not apparent to me. Does Your Honor care to look at it? The letter "c" is there.

Mr. Schnacke: I thought I saw that as "cor" under there. I may be in error.

The Court: If you want to pass it to the jury maybe at a later time—I do not know what your plans are in connection with these documents. It is hard to say now, whether it is better for you to submit them to the jury or you to try to read them. Counsel says some of it is not clear.

Mr. Schnacke: I will withdraw any suggestion that that is anything but a "c." I will proceed to read until I run into further objections, if that is satisfactory to Your Honor.

Mr. Gladstein: The only objection I had was that counsel was interpolating something that was not on the document, that is all.

The Court: If there is any necessity for doing that you [60] had better pass the document to the jury, Mr. Schnacke. Otherwise read it.

Mr. Schnacke: We can pass the document at some later time. I will read such parts of it as I can read. Any illegible parts I will omit. There is a word I can't read, and then it appears to say,

(Testimony of Roy L. Erickson.)

"Stand alone." That is in parenthesis. Under that it says, "Ask for Mike C—Don Wol 0869 is NS on H Street."

Below that it becomes difficult to read, but I believe it says, "Ron or Wilk William calling. Did Mr. Applegate—" and an illegible word—oh, "call you about your house. Reply. We have changed our mind. Time 8:30."

Then an illegible word, followed by what appears to be "corner," and then "S. A.;" an illegible letter, followed by "Ave" and "Jefferson," and below that the word "more." Mr. Erickson's initials are in the corner of that page.

Continuing on the next page, "ID each next week. Are you Williams? Yes. My name is Jim," or what appears to be "Joan," and an allegible name beginning with the letter B and appearing to end with the letter "Y." The word "Alt." "They will call, No. 1," what appears to be "Broadway 824[illegible], No. 2," ditto marks, "18831, at 9:30 P.M., Broadway at—" and an illegible word.

The next page has some matter at the top that is illegible because it has been stricken. It is followed by "Mrs. Helen V. Williams," and "C" in parenthesis, 4366, and an unidentifiable word apparently beginning with the letter R, a capital M for [61] Margaret, and the next line "1," and some unidentified symbol followed by "7:00 P.M.," the word "sign." What appears to be, "RW City," over which is written "Mabel," and on the right margin "birth-

(Testimony of Roy L. Erickson.)

day," followed by "PH," and below that what appears to be "arrive Mex."

Under that a word spelled as follows "B-a-s-t-r-a-n-i-n," and a symbol in parenthesis. Under that "5751 Thompson Court," and "Ask for Charles Destrain. You are Mr. & Mrs. Povly." Then what appears to say, "See over at the bottom of the page."

On the next page the initial M, the word "new, after notice, Mrs. Olive B. duB(C) 2866 Spruce Street, Boulder;" below which it says "24" and an unidentifiable word.

Below that, "Comes to," and an unidentifiable word followed by "Avenue." Below that an unidentifiable word followed by the letter "B, 7:00 PM and 5:30 or John Will."

The next page is captioned "Joe Salmos," the letter "C," a small c in parenthesis, and the number "2072."

Below that a small c in parenthesis, "P. H. Williams M," the number "9245," under that "S. R.," with something stricken out and a hyphen and an S, "old statue" in parenthesis, "return, add "Sol."

We next find the word "Ralph" at the head of the page, small c in parenthesis, followed by an "M" which is underlined, and then two unidentifiable symbols followed by "William C.," and it appears to be "Schied." Under that "7888." "No. G (old [62] no)" and an unidentifiable word, a line drawn across under that, the letter "C" and a small "c" in parenthesis, "Joe Hanson, 923 North Clark Street,

(Testimony of Roy L. Erickson.)

shop second floor. Be sure you are speaking to him. You are Mr. Nelson, a friend of Mr.," and an unidentifiable name. The end of the quotation marks.

The next line starts with an unidentifiable word followed by "Excuse to get him aside such as getting," and then in parenthesis "Over an old desk refinished," and then in capital letters and underlined, "Good only if Ralph speaks. Write in advance," and in parenthesis "two weeks."

On the next page we have the word "Wash, Ed Harris," the number 0671, a small "c" in parenthesis, "SO Park Ave., Tac" or "Tas" under that.

Attached to that page it reads, "8:30 PM standard." Below that "Chehalis." Below that, "one block south of bus depot is triangle park with exhibit of ancient logging equipment," parenthesis, and below that "on," and then "Hwy."

Just a couple of more pages, Your Honor.

Attached to a blank page in the book is the word "Regis, 50 percent," and an unidentifiable word and what appears to be "meet." Below that "dues, September 1, begin," a per cent sign, followed by "Okay."

Attached to a blank page, some two pages further is a typewritten sheet with certain portions removed. You can see the parts cut out. It reads, "Time, No. 1, 8:00 PM, No. 2, [63] 10:30 PM, place Ashby and College, drugstore corner, ID. His name Harold Maxwell. Person approach, John Ludford." And then there are some stars across. Below that it reads, "For appointment call," and a part of the

(Testimony of Roy L. Erickson.)

work can be read "Offic." The balance of the line there is removed except for the words "or" or the letters "or" at the end of that line.

The first part of the following line is removed, and then it goes on, "Ask for appointment for John Ludford, who has a heart condition and wants an electrocardiagram taken. He will make every effort to be at the appointed time and place on the day the call is received. The call to him should be made before 7:00 PM if possible. If the 8:00 PM appointment fails, he will be there at ten thirty or on following days until contact. He will arrive at the corner carrying two white bags."

In the corner are Mr. Erickson's initials and then on the last page on which there is any writing there is the caption, "To Mollie." Below that, "Ralph and Breta M," and something scratched out that I can't read. Below that "Phil." The next line, "Joe," a word I can't read that begins with a letter "A" followed by "MNC." Below that "W" with a dash, something stricken followed by "Sam O," a dash, "O Lady, Phil," a dash, something stricken in ink, followed by a word in pencil that seems to be "Sauna," which I can't otherwise decipher. [64]

Mr. Gladstein: If Your Honor please, now that counsel has read that, I will say I haven't examined it before in any detail, and I now move to have it all stricken on the ground it isn't probative of any issue raised by this indictment. There is no proper foundation.

The Court: Well,——

(Testimony of Roy L. Erickson.)

Mr. Gladstein: It appears to be something offered, some general thing of some kind which doesn't relate to the issues that any defendant has been charged with.

The Court: It was offered and admitted as a document found at this place.

Mr. Gladstein: It was received as such, but my point goes to an additional ground than the other grounds heretofore urged, and that is that the mere presence of a notebook or some document at that time and place wouldn't in and of itself make it material, competent and relevant to some issue raised by the indictment.

The Court: It is pretty early to say that. I can't rule on that now.

Mr. Gladstein: Very well.

The Court: You can move to strike it if it isn't connected up, if it doesn't have some relevancy later on.

Mr. Gladstein: Very well.

Mr. Schnacke: Q. Mr. Erickson, I will show you a small scrap of paper and ask you if you have ever seen that before, [65] and, if so, when and where?

A. Yes, I have. I found this in the zipper briefcase that was on the dresser in the bedroom above the living room.

Mr. Schnacke: I will ask that that paper be received in evidence and marked Government's exhibit next in order.

Mr. Gladstein: May I examine it for a moment?

(Testimony of Roy L. Erickson.)

Yet, I will make the same objection to this as has been heretofore made to similar documents, if your Honor please.

The Court: I think these documents in some way are going to be connected up further.

Mr. Schnacke: Your Honor please, the offer at the present time is on the basis of their being found in the cabin. This particular document, as well as all of the documents that we have introduced so far, will be connected up.

That is not necessarily true of every document that we will heretofore offer. I am offering them at this time as having been found in the cabin in the presence of these defendants.

Mr. Gladstein: Your Honor, I think that is a misstatement already. I don't understand from this witness' testimony that any of these documents were taken from the house in the presence of any of the defendants. Perhaps that was just an inadvertence on counsel's part.

At the same time, I would like to request if the Court would ask Mr. Schnacke to do this, that he tell me when they [66] are offered that they have no intention of connecting them further, that he would be good enough to advise us of that, because otherwise I assume he is going to do some connecting.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 27 introduced and filed into evidence.

(Testimony of Roy L. Erickson.)

(Thereupon document referred to above was received in evidence and marked Plaintiff's Exhibit No. 27.)

The Court: Where did you say this was found?

The Witness: In the briefcase on the dresser.

Mr. Schnacke: Q. Mr. Erickson, I will show you another notebook and ask if you have ever seen that before and, if so, when and where?

A. Yes. I also found this in that briefcase that was on the dresser in the bedroom above the living room.

Mr. Schnacke: I will ask that that notebook be received in evidence as Government's Exhibit next in order.

Mr. Gladstein: Same objection, if Your Honor please.

The Court: Same ruling.

The Clerk: Plaintiff's Exhibit 28 introduced and filed in evidence.

(Thereupon notebook referred to above was received in evidence and marked Plaintiff's Exhibit No. 28.) [67]

Mr. Schnacke: Q. Mr. Erickson, you mentioned earlier that on your examination of the cabin you discovered that there were two typewriters on the premises. Will you tell us again what type of typewriters they were and where you discovered them?

A. One was under the desk on the first floor of the cabin in the living room. That was a portable Royal typewriter.

The second was found on the second floor of the

(Testimony of Roy L. Erickson.)

cabin, in the small bedroom that was more or less above the kitchen side of the house, and it was under the dresser. That was a Remington upright or standard style of typewriter.

Q. In connection with those typewriters, did you thereafter have occasion to make certain tests?

A. I took specimens of the type from them, yes.

Q. I will show you a group of typewritten pages and ask you if they are the specimens that you took from one of the typewriters found in the cabin?

A. Four sheets were taken from the Remington typewriter on February 16, 1954; and the remaining 12 were taken on March 17, 1954, from the same typewriter.

Q. Now, Mr. Erickson, those sheets, as I understand it, contain meaningless matter typed out simply to test the typewriter, is that correct; or to give adequite samples of the work done by the typewriter? A. That's right. [68]

Q. Have those typewriter samples been in your possession since the time you made them?

A. Except for the period they were transmitted to our laboratory in Washington.

Q. You sent them to the FBI laboratory in Washington, D. C.? A. That's right.

Q. And were they returned to you by that laboratory? A. Yes.

Q. And they have been in your possession since that time until you gave them to me?

A. That's right.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: While counsel is examining those —I intend to offer those in evidence, Your Honor please, but counsel is looking at them carefully—I will ask the witness to examine these other typewritten pages and request that he tell us what they represent?

A. Nine of these pages were taken as specimens from the Royal Portable typewriter on February 15th, 1954. The remaining seven were taken from the same typewriter on March 18, 1954.

Mr. Schnacke: At this time I offer as evidence, solely as samples of the characteristics of the Remington Noiseless typewriter found in the cabin, the document Mr. Erickson described as the sample he had taken from the Remington Noiseless typewriter. [69]

Mr. Gladstein: I wish Your Honor would examine the contents before ruling. I make more or less the same objection, but I think particularly in view of the content they should not be received in evidence, although I understand counsel is offering them merely as a sample of the kind of typewriting done on the two typewriters.

The Court: Not for their contents?

Mr. Schnacke: Not for their contents, Your Honor.

Mr. Gladstein: But I don't see how you can separate the contents in any way.

The Court: Well, let them be marked for the limited purpose of being samples of the typewriter,

(Testimony of Roy L. Erickson.)

and they will not be exhibited to the jury unless it appears there is something else.

Mr. Gladstein: Very well. May I add one more objection that I had in mind, Your Honor, and that is that I think any sample taken from a typewriter whose seizure was not proper or legal would be improper to offer. That would go to these two.

The Court: You are making a motion——

Mr. Gladstein: To suppress.

The Court: All right, denied.

The Clerk: Plaintiff's Exhibit 29 introduced and filed into evidence as limited by the Court.

(Thereupon typewriting sample identified above [70] was received in evidence as Plaintiff's Exhibit 29, for the limited purpose stated.)

Mr. Schnacke: At this time I will offer the typewriter samples Mr. Erickson testified he took from the Royal typewriter found on the premises, as Government's exhibit next in order.

The Court: Subject to the same objection and admitted for the limited purpose already specified?

Mr. Schnacke: Yes, Your Honor.

The Clerk: Plaintiff's Exhibit 30 introduced and filed into evidence, as limited by the Court.

(Thereupon typewriting sample identified above was received in evidence and marked Plaintiff's Exhibit No. 30 for the limited purpose stated.)

Mr. Schnacke: Q. Mr. Erickson, I will show

(Testimony of Roy L. Erickson.)

you a three-page document and ask you if you have even seen that before, and if so, when and where?

A. Yes. I found this in a cardboard box that I previously testified was found on top of the dresser in the bedroom above the living room. That was a box which was unmarked. That is, I couldn't tell what the original purpose of the box was. On one end there were some numerals pressed in it or inked in reading "52-53".

Mr. Schnacke: I offer that document in evidence as Government's Exhibit next in order. [71]

Mr. Gladstein: Before we advise the Court, may we read it? It is a long three-page document.

The Court: Are you going to read this?

Mr. Schnacke: I propose to read parts of it, Your Honor. Might it be convenient to recess while counsel is referring to it? It might take some time.

Mr. Leonard: My suggestion is, if Mr. Schnacke has any other documents that would require some little time, we might see them now.

Mr. Schnacke: Yes, I have several.

Mr. Leonard: We have never seen these before.

The Court: Why don't you give them to counsel? We will have a recess a little bit earlier today and you can look at these documents.

Mr. Schnacke: Yes, I think that might be quite advisable.

The Court: We will take a recess a little bit

(Testimony of Roy L. Erickson.)

earlier this afternoon, ladies and gentlemen, so counsel can look at these documents.

(Short recess.)

Mr. Gladstein: May it please Your Honor, at the recess Mr. Schnacke handed us some eleven documents. They comprise approximately 50 pieces or more, in some instances of very closely typed material and in some instances of written material. It is obvious that Mr. Leonard and I have had no [72] opportunity to examine them. We would not be in a position to make our statement to the Court concerning them.

Mr. Schnacke: If Your Honor please, maybe I can shorten this. I will offer them for identification at this time and offer them in evidence tomorrow morning and counsel will have an opportunity over night to examine them.

The Court: That will be better.

Mr. Schnacke: So the document last referred to by the witness, Mr. Erickson, I will offer for identification, to bear the Government's next number.

Mr. Gladstein: Is that the three-page document?

The Clerk: That is correct, Mr. Gladstein.

(Thereupon the three-page document referred to was marked Plaintiff's Exhibit No. 31 for identification.)

Mr. Schnacke: Q. Mr. Erickson, I will show you a notebook and ask you if you have even seen that before and, if so, when and where?

A. Yes. I found this in one of the three boxes I previously testified were at the foot of the bed

(Testimony of Roy L. Erickson.)

in the bedroom above the living room side of the house. This particular box was apparently originally a box for soup—Rancho soup.

Mr. Schnacke: I will ask that the notebook described by the witness be marked Government's Exhibit 32 for identification. [73]

The Clerk: Plaintiff's Exhibit No. 32 marked for identification.

(Thereupon notebook referred to above was marked Plaintiff's Exhibit No. 32 for identification.)

Mr. Schnacke: Q. I show you a two-page document and ask you if you have ever seen that before, and, if so, when and where?

A. This was in one of the suitcases in the closet of the bedroom on the living room side of the house. The suitcase I have previously testified to as having some documents. It appeared to be a tanned suitcase, leatherette or similar material.

Mr. Schnacke: I will ask that the document described by the witness be marked Government's Exhibit next in order for identification.

(Thereupon two-page document referred to was thereupon marked Plaintiff's Exhibit No. 33 for identification.)

Mr. Schnacke: Q. I will show you what appears to be three identical mimeographed copies of a document—or four copies of the same document, and ask you if you have ever seen those before, and, if so, when and where?

A. All four of these were found in the expan-

(Testimony of Roy L. Erickson.)

sion briefcase I previously testified to as being on the bed in the bedroom [74] on the living room side of the house.

Mr. Schnacke: I will ask that all of those documents, all four of those documents, be offered as Government's Exhibit next in order for identification.

(Thereupon four copies of mimeographed document referred to above was marked Plaintiff's Exhibit No. 34 for identification.)

Mr. Schnacke: Q. I will show you a document consisting of several pages and ask you if you have ever seen that before, and, if so, when and where?

A. This document was found in its present state in the expansion briefcase that the last exhibit was found in.

Mr. Schnacke: I will ask that that document just described by the witness be marked Government's Exhibit next in order for identification.

(Thereupon several page document referred to above was marked Plaintiff's Exhibit No. 35 for identification.)

Mr. Schnacke: Q. I show you another document which appears to be torn in places and ask you if you have ever seen that before, and, if so, when and where?

A. This was also found in the expansion briefcase.

Q. The cellophane around it, I take it that was put there by you to preserve it?

A. I put it in there for that purpose, yes. [75]

(Testimony of Roy L. Erickson.)

Mr. Schnacke: You have no objection to the cellophane being on it?

Mr. Gladstein: No.

Mr. Schnacke: I will ask that that document be marked Government's Exhibit next in order for identification.

(Thereupon torn document described above was marked Plaintiff's Exhibit No. 36 for identification.)

Mr. Schnacke: Q. I show you a two-page document and ask you if you have even seen that before, and, if so, when and where?

A. This was also found in the expansion briefcase.

Q. The same expansion briefcase to which you have previously referred? A. Yes, sir.

Mr. Schnacke: I will ask that that document just described by the witness be marked Government's Exhibit next in order, for identification.

(Thereupon two-page document described above was marked Plaintiff's Exhibit No. 37 for identification.)

Mr. Schnacke: Q. I show you a four-page document and ask you if you have ever seen that document before, and, if so, when and where?

A. This was also in the expansion briefcase I have previously [76] testified to.

Q. I call your attention to the fact that there is a paper clip at the upper left-hand corner of that. Was that document clipped together in that fashion when you found it?

(Testimony of Roy L. Erickson.)

A. When we found it, yes; the original staple was probably removed for photostating.

Q. On any of these documents have you tampered with them in any way or changed them in any way? A. No.

Q. Done anything to them other than examine them? A. No.

Q. In some cases make copies of them?

A. No.

Mr. Schnacke: I will ask that that document identified by the witness be marked Government's Exhibit next in order for identification.

(Whereupon four-page document identified above was marked Plaintiff's Exhibit No. 38 for identification.)

Mr. Schnacke: Q. I show you a document consisting of several pages and ask you if you have ever seen that document before? And, if so, when and where?

A. This was also found in the expansion briefcase that was on the bed in the bedroom above the living room side of the house. [77]

Mr. Schnacke: I ask that that document just referred to be marked Government's Exhibit next in order for identification.

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 39 for identification.)

Mr. Schnacke: Q. I show you what appears to be two separate documents, each consisting of a number of pages stapled together, and ask if you

(Testimony of Roy L. Erickson.)

have ever seen that document before, and, if so, when and where?

A. This was also in the expansion briefcase, as the last exhibit.

Q. I call your attention to the fact that on that document, there is a staple on it. Was that the condition in which you found it?

A. The staples may have been removed for photostating, and then placed back.

Q. But if it is now stapled, it was stapled in that fashion when you found it?

A. Yes, sir.

Mr. Schnacke: I will ask that the document just described be marked as Government's Exhibit next in order for identification.

(Thereupon document described above was marked Plaintiff's Exhibit No. 40 for identification.) [78]

Mr. Schnacke: Q. I show you several miscellaneous sized documents and an envelope, and ask you if you have ever seen those before, and, if so, when and where, and under what circumstances the documents were arranged, or in what fashion they were arranged?

A. All of the papers clipped to the envelope were in the envelope, and the envelope with its contents was in the expansion briefcase on the bed in the bedroom above the living room side of the house.

Mr. Schnacke: I will ask that all of the documents and the envelope in which the documents

(Testimony of Roy L. Erickson.)

were found be marked as Government's Exhibit next in order for identification.

(Thereupon documents and envelope described above were marked Plaintiff's Exhibit No. 41 for identification.)

Mr. Gladstein: Your Honor, it would assist me in my examination of these documents this evening, if counsel would be good enough to state whether some or any or all of these, beginning with, I think, 31 for identification, fall in the category of what he said were documents concerning which he would or would not offer further evidence in connection.

The Court: Offer what?

Mr. Gladstein: Further evidence of connection with the defendants, or any of them.

Mr. Schnacke: Your Honor please, these documents are [79] being offered at this time, and I would prefer they be offered without any representation of further connecting up by reason of the fact that I think it is quite clear some of them will and some of them will not be connected up.

I prefer to have a ruling as to whether or not these documents found on these premises and under these circumstances are or are not admissible as they were so found. If that ruling is adverse to the Government, then I will be happy to make an offer such as suggested by counsel for the defendant as to which of the documents we will connect up and in what fashion.

The Court: Well, we better wait to meet that when you offer them.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Your Honor please, I have here an additional large number of documents which I will offer in groups, if I may, and will provide copies to the defendant in the same fashion as the others.

I offer them at this time solely for identification and will renew our offer—make our offer to introduce them into evidence tomorrow.

The Court: Mr. Schnacke, would it be possible for you to get all these documents marked, given an identification number by the Clerk after we adjourn today and furnish copies to the other side? Then you will have them all given a number already by the Clerk and cover them then one at a time, or [80] all in one group. It saves your walking back and forth each time you go to pick up a paper and go through the routine of doing that.

Mr. Schnacke: Very well.

The Court: That may save time.

Mr. Schnacke: All right.

The Court: I don't know whether that is in accordance with what you planned as to the method of presenting the matter. I just suggest that at this time. Maybe it isn't possible. However, there is a large number of papers, and if you had them all given a number by the Clerk tonight, then you can put the witness on to identify them all at one time, one right after the other, without any difficulty.

Mr. Schnacke: Yes, Your Honor. Will you indulge me for a moment?

Your Honor please, the only further matter I

(Testimony of Roy L. Erickson.)

have from this witness is the introduction of these documents. I will try to do it as expeditiously as possible, in the same fashion we have been doing.

The Court: If you want to do it that way,——

Mr. Schnacke: I think we can go through them rather rapidly.

The Court: All right.

Mr. Schnacke: Q. Mr. Erickson, I show you a group of papers and ask you if you have ever seen those before, and [81] under what circumstances?

The Court: This witness, I take it from what you said, is being used only for the purpose of identifying where the documents came from?

Mr. Schnacke: Yes, Your Honor.

The Court: And where they had been?

Mr. Schnacke: That is right.

The Witness: These are seven receipts found in the cardboard box I previously testified to as having been found in the closet at the head of the stairway on the second floor. That cardboard box was apparently originally a container for Burgermeister beer.

Mr. Schnacke: I will offer the documents which have been described as a group as Government's Exhibit next in order for identification.

(Thereupon documents referred to above were marked Plaintiff's Exhibit No. 42 for identification.)

Mr. Schnacke: Q. And I will ask the witness if the documents he is now examining have ever

(Testimony of Roy L. Erickson.)

before been seen by him and, if so, when and where?

A. These six slips of paper were also found in the box found in the closet at the head of the stairway on the second floor.

The Court: What are you doing with those, counsel? Do [82] you just have a clip on them?

Mr. Gladstein: I suggest they be put in an envelope.

The Court: Have you got any envelopes? Otherwise, my experience with some of these cases is that by the time the lawyers get through using these exhibits they get so mixed up we never can find them again. Put them in in some way so we won't get mixed up on them, now. The last one we had was No. 42.

The Clerk: No. 42 for identification, Your Honor.

Mr. Schnacke: And the group of documents last described I will ask be marked for identification as Government's Exhibit next.

(Thereupon group of papers referred to above were marked Plaintiff's Exhibit No. 43 for identification.)

Mr. Gladstein: One of these got lost already, Your Honor. Were there six or seven?

Mr. Schnacke: Seven.

Mr. Gladstein: I only find six.

(Further colloquy inaudible to the Reporter.)

Mr. Schnacke: Q. Did you identify that? The

(Testimony of Roy L. Erickson.)

document you are now looking at, Mr. Erickson, where did you find those?

A. These seven receipts were also found in the Burgermeister beer box in the closet at the head of the stairway. [83]

Mr. Schnacke: I will ask that the group of documents last identified be received and bear the Government's next in order.

(Thereupon seven receipts referred to were marked Plaintiff's Exhibit No. 44 for identification.)

Mr. Schnacke: Q. Now, I will show you a document consisting of one page, and ask you when and where you saw that, Mr. Erickson?

A. This was also in the Burgermeister beer box in the closet at the head of the stairway.

Mr. Schnacke: I will ask that that be marked with the Government's Exhibit next in order.

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 45 for identification.)

Mr. Schnacke: Q. I will show you another document and ask you if you have seen that document before?

A. This was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 46 for identification?

(Thereupon document referred to was marked Plaintiff's Exhibit No. 46 for identification.)

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. And I will ask you the same question [84] with respect to that document (handing document to the witness)?

A. This was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: I will ask that that document, consisting of three pages, be marked Government's Exhibit 47 for identification.

(Thereupon three-page document referred to was marked Plaintiff's Exhibit No. 47 for identification.)

Mr. Schnacke: Q. And I will ask you the same question with respect to that document?

A. This was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked as Government's Exhibit 48 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 48 for identification.)

Mr. Schnacke: Q. And I will ask you the same question with respect to that document?

A. This was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 49 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 49 for identification.) [85]

Mr. Schnacke: Q. And I will ask the same question with respect to that document.

(Testimony of Roy L. Erickson.)

A. This, too, was found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 50 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 50 for identification.)

Mr. Schnacke: Q. And the same question with respect to this document?

A. And this was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 51 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 51 for identification.)

Mr. Schnacke: Q. Same question as to that document?

A. This was found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Plaintiff's Exhibit 52 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 52 for identification.) [86]

Mr. Schnacke: Q. Did you see that document in the cabin and, if so, where?

A. Yes. This was also in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 53 for identification?

(Testimony of Roy L. Erickson.)

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 53 for identification.)

Mr. Schnacke: Q. And the same question as to that document?

A. This, too, was found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Exhibit 54 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 54 for identification.)

Mr. Schnacke: Q. Same question with respect to that document?

A. This was found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Exhibit 55 for identification? [87]

The Clerk: Plaintiff's Exhibit No. 55 marked for identification.

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 55 for identification.) [87-A]

Mr. Schnacke: Q. When and where did you see that document?

A. This was found in the brief case which was on the dresser in the bedroom on the living room side of the house.

Q. I take it it was not in the cellophane bag; it was in the loose fashion, is that right?

A. That is right.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: May that be marked Government's Exhibit 56?

(Whereupon the document referred to was marked Government's Exhibit No. 56 for identification only.)

Mr. Schnacke: Q. I show you a manila folder containing a manila envelope and ask you if you saw that the the cabin?

A. This was in the expansion brief case which was on the bed of the bedroom above the living room side of the house.

Mr. Schnacke: I will ask that the large envelope referred to by the witness be marked Government's Exhibit 57 for identification.

(Whereupon the large envelope referred to above was marked Government's Exhibit No. 57 for identification only.)

Mr. Schnacke: Q. I will show you a book containing numbers in writing and ask the same question in respect to that.

A. This was found in the expansion brief case on the bed, in [88] the bedroom above the living room.

Mr. Schnacke: May that be marked Government's Exhibit 58 for identification?

(Whereupon book referred to above was marked Government's Exhibit No. 58 for identification only.)

Mr. Schnacke: Q. I will show you a single sheet of paper and I will ask you the same question with respect to that.

(Testimony of Roy L. Erickson.)

A. This, too, was found in the expansion brief case on the bed in the bedroom above the living room.

Mr. Schnacke: May that be marked Government's Exhibit 59?

(Whereupon sheet of paper referred to above was marked Government's Exhibit No. 59 for identification only.)

Mr. Schnacke: Q. The same question with respect to this paper?

A. This was found in the expansion brief case on the bed as previously stated.

Mr. Schnacke: May that be marked Government's Exhibit 60 for identification?

(Whereupon paper referred to above was marked Government's Exhibit No. 60 for identification only.)

Mr. Schnacke: Q. I will show you a notebook and ask you if you have seen that document before? [89]

A. This was found in the expansion brief case by the bed.

Mr. Schnacke: If Your Honor please, I discovered that the photostatic copies that I have of this notebook are incomplete. May I ask that the Government and the defendants have the opportunity to withdraw this notebook and to examine it or make copies from it if they so desire?

The Court: Very well.

Mr. Schnacke: I ask that the notebook be

(Testimony of Roy L. Erickson.)

marked Government's Exhibit 61 for identification.

(Whereupon notebook referred to above was marked Government's Exhibit No. 61 for identification only.)

Mr. Schnacke: Q. Will you identify that document?

A. This was found in the expansion brief case on the bed.

Mr. Schnacke: May that be marked 62 for identification?

(Whereupon document referred to above was marked Government's Exhibit No. 62 for identification only.)

Mr. Schnacke: Q. I will show you a folder containing certain papers and ask you if you can identify that.

A. The papers as they are now clipped were found in the folder they are now contained in and were found in the expansion brief case on the bed.

Mr. Schnacke: May that be marked Government's 63 for identification? [90]

(Whereupon papers and folder referred to above were marked Government's Exhibit No. 63 for identification only.)

Mr. Schnacke: Q. I show you a notebook and ask you if you can identify that?

A. This was found in the expansion brief case on the bed, in the bedroom above the living room.

Mr. Schnacke: May that be marked 64 for identification?

(Testimony of Roy L. Erickson.)

(Whereupon notebook referred to above was marked Government's Exhibit No. 64 for identification only.)

Mr. Schnacke: Q. I will show you a sheet of paper bearing typing and handwriting and ask you if you can identify that?

A. This was found in the expansion brief case on the bed.

Mr. Schnacke: May that be Government's 65 for identification?

(Whereupon sheet of paper referred to above was marked Government's Exhibit No. 65 for identification only.)

Mr. Schnacke: Q. Will you identify this sheet of paper?

A. This was found also in the expansion brief case on the bed.

Mr. Schnacke: May that be Government's 66 for identification? [91]

(Whereupon sheet of paper referred to above was marked Government's Exhibit No. 66 for identification only.)

Mr. Schnacke: Q. I will show you a group of several pages and ask you if you can identify those?

A. These were found clipped together in the brief case, the expansion brief case on the bed in the bedroom above the living room.

Q. They appear to be torn from a notebook. Did you tear them from a notebook. Did you tear

(Testimony of Roy L. Erickson.)

them from the notebook or were they in that condition when you found them?

A. No, they were in that condition.

Mr. Schnacke: I will ask that be marked 67 for identification.

(Whereupon pages from notebook referred to above were marked Government's Exhibit No. 67 for identification only.)

Mr. Schnacke: Q. I will show you several pages containing handwriting and ask you to identify that.

A. These were found clipped together in the expansion brief case that was on the bed.

(Whereupon pages referred to above were marked Government's Exhibit No. 68 for identification only.)

Mr. Schnacke: Q. I show you a small page and a large [92] page clipped together. Can you identify those?

A. These were found as they are now fastened in the expansion brief case that was on the bed.

Mr. Schnacke: May that be 69 for identification?

(Whereupon pages referred to above were marked Government's Exhibit No. 69 for identification only.)

Mr. Schnacke: Q. I will show you one page folded and ask you for your identification of that?

A. This was found in the expansion brief case that was on the bed.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: May that be marked 70 for identification?

(Whereupon folded page referred to above was marked Government's Exhibit No. 70 for identification only.)

Mr. Schnacke: Q. I show you several pages held together by a paper clip and ask you where you found those and in what condition you found them?

A. The four papers, or I should say the three papers, and one three by five card, were folded and in the envelope and all were contained in the expansion brief case which was found on the bed.

Mr. Schnacke: May that be marked 71 for identification?

(Whereupon the documents referred to were marked Government's Exhibit No. 71 for identification only.) [93]

Mr. Schnacke: Q. I show you an envelope and a sheet of paper and ask you if you can identify those and tell me of the circumstances in which they were found?

A. The paper was found folded in the envelope and the envelope was found in the expansion brief case that was found on the bed.

Mr. Schnacke: May the envelope and the paper together be marked Plaintiff's Exhibit 72 for identification?

(Whereupon envelope and paper referred to above were marked Government's Exhibit No. 72 for identification only.)

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. Will you identify that paper?

A. This was found in the expansion brief case which was on the bed.

Mr. Schnacke: May that be marked 73 for identification?

(Whereupon the paper referred to above was marked Government's Exhibit No. 73 for identification only.)

Mr. Schnacke: Q. I will show you an envelope and a sheet of paper and ask you where you first saw those and the circumstances under which you found those?

A. The paper was found folded in the envelope and the envelope was found in the expansion brief case which was on the bed.

Mr. Schnacke: May this be marked Government's 74 for [94] identification?

(Whereupon envelope and sheet of paper referred to above were marked Government's Exhibit No. 74 for identification only.)

Mr. Schnacke: Q. I will show you a manila envelope and a sheet of paper. Where did you see those?

A. The paper was found folded in the envelope and the envelope was found in the expansion brief case which was on the bed.

Mr. Schnacke: May that be marked 75 for identification?

(Testimony of Roy L. Erickson.)

(Whereupon manila envelope and sheet of paper referred to above were thereupon marked Government's Exhibit No. 75 for identification only.)

Mr. Schnacke: Q. I will show you a group of papers appearing to be two envelopes and papers attached thereto and ask where you saw those and the circumstances?

A. The two papers were found in the smaller envelope and the smaller envelope and the larger envelope all was found in the expansion brief case which was on the bed.

Mr. Schnacke: May that be marked Government's Exhibit 76 for identification?

(Whereupon the group of papers and envelopes referred to above were marked Government's Exhibit No. 76 for identification only.)

Mr. Schnacke: Q. I will show you what appear to be two envelopes and two pieces of paper clipped together. I ask you where you saw those and the circumstances of your identification?

A. The air mail envelopes and the two slips of paper were in the larger brown envelope and all was found in the expansion brief case which was on the bed.

Mr. Schnacke: May that be Government's 77 for identification?

(Whereupon the envelopes and paper referred to above were thereupon marked Government's Exhibit No. 77 for identification only.)

Mr. Schnacke: If your Honor please, I have no further questions of this witness. If any additional questions of this witness on direct examination are necessary to clarify any points that may arise after the offer of these documents in evidence, I would like to reserve the right to recall him.

At this time we are through with the direct examination of this witness.

Mr. Gladstein: If Your Honor please, we have just been handed some 200 or 250 pages of documents, some 30 or 40 exhibits. If I were to stay up all night long reading them, I doubt if I could possibly——

The Court: These documents have been identified.

Mr. Gladstein: That is true as to the documents since 31, [96] but it is not true as to others that have been received in evidence. I would like to suggest that this is precisely the kind of material that we requested by proper motion before the trial, and we are now placed in a position where we cannot examine these. They are going to be offered in evidence by counsel for the prosecution at some point through some witness, and we should have a familiarity with these documents in advance. I do not want to take the time of the Court and jury on this occasion.

The Court: All the witness has testified as to the other documents is as to where he found them.

Mr. Gladstein: That may well be. It is a matter of deferring when we have to read these and examine them.

The Court: Do you want to put this witness back on and cross examine him altogether at one time? Is that what you mean?

Mr. Gladstein: I do not think the difference between now and 4:00 o'clock——

The Court: Our adjournments are usually at 4:30. Is there some other matter you can take up? I think it is a little bit tiring to put in all these documents in one day, but after all, we would not like to keep the jury here indefinitely in days if we can clean up, take care of some other matters.

Mr. Schnacke: I would assume there would be some cross [97] examination as to matters as to which Mr. Gladstein has not claimed surprise. He certainly does not claim surprise as to all matters.

The Court: Can't you start your examination with respect to the other matters the witness has testified to except for these documents?

Mr. Gladstein: I would prefer not, if Your Honor please. I have been doing nothing but making a record here of the documents that have been handed to me, which I would like to examine, and that includes some of the documents that were received in evidence.

The Court: Are you going to have any more documents from this witness?

Mr. Schnacke: No, Your Honor. I have completed the examination of this witness. I can produce another witness if they want to waive cross examination of Mr. Erickson.

Mr. Gladstein: We will not waive any cross examination. If Your Honor requires it, we will com-

mence the cross examination now, but we would prefer to have an opportunity to examine the documents. I would think in the orderly process that would be desirable, instead of chopping up our cross examination of the witness at the point where counsel chose to leave off with all these documents in evidence.

The Court: He did that at the Court's suggestion to save time. [98]

Mr. Leonard: May I suggest that when I argued the motion for discovery, for a bill of particulars particularly, in which we saw precisely this information, Your Honor made some observation from the bench. I do not purport to quote you verbatim. But the general tenor of it was that if, as and when documents of this kind were introduced, the defense would be given plenty of opportunity to examine them and prepare for them.

The Court: I do not suggest that you would not have the opportunity to look at them. I wondered if you did not have some examination that you could go into to save time that does not refer to the documents. It is only recently that the examination has been confined to the documents.

I guess the jury is getting a little tired today sitting here anyhow. I see you nod your heads. We will take an adjournment until 10:00 o'clock tomorrow morning.

Please bear in mind the admonition of the Court.

(Whereupon this cause was adjourned to the hour of 10:00 o'clock a.m., Wednesday, April 14, 1954.) [99]

The Clerk: United States vs. Kremen, et al, further trial. Roy Erickson on the stand.

ROY L. ERICKSON

resumed the stand as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows:

Cross Examination

Mr. Gladstein: Shall I proceed, Your Honor?

Q. Mr. Erickson, you have told us that on the 27th of August from about 5 o'clock in the morning you and certain other agents of the Federal Bureau of Investigation took up a position from which you could keep the house there or cabin at the Twain Harte and its occupants under surveillance, that is right, isn't it?

A. That's right.

Q. I think you said that there were, how many other agents with you? A. Four.

Q. Five of you, including yourself?

A. Five altogether.

Q. Did you tell us who the other agents were?

A. No, I didn't.

Q. Would you do so?

A. Yes. There was Albert Clark.

Q. Yes?

A. Joseph McCann—that is spelled M-c C-a-n-n. James Carlisle—C-a-r-l-i-s-l-e. And Robert Hamilton—H-a-m-i-l-t-o-n.

Q. Now, the position that you and the other four agents whom you have just named took up

(Testimony of Roy L. Erickson.)

was on a hillside or in a hilly area from which you could look down, is that right?

A. That's right.

Q. And that is the spot you indicated generally in that first exhibit which represented your drawing of the place? A. That is right.

Q. Were you joined between then and 1:04 in the afternoon by any other agents? A. No.

Q. And were all of the other agents whom you named, were they continuously with you during that period of time? A. Yes, sir.

Q. The arrest—I have mentioned 1:04 p.m. because I think I correctly repeat what you said, that was the time approximately of the arrest?

A. Approximately, yes.

Q. You did say 1:04, didn't you? [103]

A. 1:04, to my watch, when we got the orders.

Q. All right. Now, at the time that you took up your watch there that morning, of course you were acting pursuant to instructions of some superior, weren't you? A. Yes, sir.

Q. And from where did you and these other members of the FBI come? What city?

A. From San Francisco, of course.

Q. Approximately when did you leave San Francisco?

Mr. Schnacke: I will object to that as not being material to any issues in this case.

The Court: It is pretty far afield, isn't it? What difference does it make?

Mr. Gladstein: (Inaudible to the Reporter.)

(Testimony of Roy L. Erickson.)

The Court: Unless it has some bearing on the credibility or something of that kind. I will overrule the objection.

The Witness: Actually, I think I left the city, it was, as I recall it, real early in the morning. I was instructed—I was conducting an investigation elsewhere, on the Peninsula, and was instructed to proceed on up to Twain Harte, being in a radio car.

Mr. Gladstein: Q. But my question was, approximately when did you and these other men you have named leave the city area to go to Twain Harte?

A. Well, I would say we left probably about 4:30. Between [104] 4 and 5 p.m. on the 26th day of August.

Q. That was the day before?

A. Yes, sir.

Q. I see. Now, were you told whom you were looking for or searching for or to arrest?

Mr. Schnacke: I object to that as being immaterial. I don't think the instructions that this agent had in any way bear upon his testimony on direct examination.

Mr. Gladstein: I will withdraw the question.

Mr. Schnacke: The question was, what he saw.

Mr. Gladstein: Q. Whom were you looking for?

A. We were looking for what we commonly have been calling "communist fugitives".

Q. Anyone by name?

A. No, not in particular.

(Testimony of Roy L. Erickson.)

Q. Now, you mentioned yesterday that during the course of your vigil there—. No, withdraw that.

You mentioned after the arrest you had some fingerprint cards of some kind, do you recall?

A. Yes.

Q. The fingerprint cards of what person or persons?

A. I had with me a complete set of the identification order cards, as I called them, on all of the so-called communist fugitives.

Q. Well, how many? Just give me a number.

A. Seven.

Q. You had seven cards? A. Yes.

Q. You had no card for Shirley Kremen, did you? A. No.

Q. You had no card for Patricia Blau, did you?

A. No, sir.

Q. You had no card for Carl Ross?

A. No, sir.

Q. And you had no card for Sam Coleman?

A. No, sir.

Q. I take it you had a card for Robert Thompson? A. Yes.

Q. Did you have a card for Sidney Steinberg?

A. Yes, sir.

Q. Did you take with you photographs of any kind?

A. Photographs appear on the card, yes.

Q. Then the very card that had the fingerprints also had photographs? A. Yes, sir.

Q. I take it you took all those with you when

(Testimony of Roy L. Erickson.)

you left in the late hours of the afternoon of August 26th? A. That's right.

Q. By the way, were you, Mr. Erickson, in charge of this group of agents whose names you have given us? [106]

A. Well, I don't think anyone was in charge. We were instructed to go there as a group, that is all.

Q. All right. It is true, then, that you had no photographs with you of those defendants whom I have named in my earlier question, that is, Shirley Kremen, Patricia Blau, Carl Ross and Sam Coleman? A. That's right.

Q. Now, you have testified that about 1 o'clock or 1:04 when you got instructions to make an arrest, an automobile or several automobiles were coming up toward the driveway of the house, is that right? A. That's right.

Q. And those cars contained agents of the FBI?

A. Yes, sir.

Q. And how many such cars were there?

A. There were five.

Q. How many agents altogether were there, excluding or including the five you have told us about?

A. Well, on my best recollection, reviewing the whole thing there were around 15 or 16 agents and one woman who came as a matron.

Q. Where did she come from?

A. She came from our San Francisco office.

(Testimony of Roy L. Erickson.)

Q. Did you put in a call for a matron to be sent?

Mr. Schnacke: Oh, I object to that as immaterial. What [107] relevancy does that have to anything this witness has testified?

The Court: Sustained.

Mr. Gladstein: Q. The matron, I take it, was brought so that a woman could conduct a search of Mrs. Kremen?

Mr. Schnacke: I object to that question as calling for an opinion and conclusion of the witness.

Mr. Gladstein: If he doesn't have any knowledge of it, he can say so, Your Honor.

The Court: Well——

Mr. Schnacke: (interposing) Why she was brought isn't material. She was there.

The Court: The objection is on the basis of the immateriality.

Mr. Gladstein: I am trying to establish the time, if Your Honor please, when it was determined to make an arrest of Mrs. Kremen, and I think that time can be elicited by establishing the time when an order was—when the fact was established that a matron was to be brought there.

Mr. Schnacke: I do not think the state of mind of the arresting officers or when they decided to make an arrest is material.

The Court: I am inclined to go along with you on that. Doesn't make any difference whether they have good, bad or indifferent motives. The only

(Testimony of Roy L. Erickson.)

thing that matters is what [108] happened. I will sustain the objection.

Mr. Gladstein: Q. Who was the matron?

A. Mrs. Elizabeth Kranke—K-r-a-n-k-e.

Q. I take it she is connected with the staff of the FBI here in San Francisco?

A. Yes, she is.

Q. When the automobiles came up to the premises, various agents immediately got out of the cars, did they not? A. Yes, sir.

Q. Did they or some of them draw firearms?

A. Yes, we all did.

Q. And directed them at the defendants?

A. "Directed"? I wouldn't call it "directed". We had them in our hands ready for any eventuality.

Q. And they were kept pointed, let's say,—or withdraw that. They were kept drawn, were they, for some time?

A. They were drawn until what we call submission to arrest, which was the time of handcuffing.

Q. There wasn't any effort on the part of anybody to avoid submission to arrest, was there?

A. No, sir.

Q. There wasn't any effort on the part of anyone to prevent the arrest of some other person there, was there? A. No, sir.

Q. And there was no effort on the part of anyone to escape [109] or seek flight of any kind, was there? A. No, sir.

(Testimony of Roy L. Erickson.)

Q. Now, you have told us that the senior agent, I thing you called him, or the officer in charge, or the agent in charge, addressed the people who were arrested and, among other things, said that they need not say anything, something of that sort, is that right? A. Yes, sir.

Q. And of course—withdraw that.

And I think you also said that the defendants did remain mute? That is so? A. Yes, sir.

Q. You testified yesterday that there came a time while you were watching the house when you became satisfied that one of the persons there was Robert Thompson, am I correctly quoting what you said?

A. No. We were satisfied that two of the people there were fugitives.

Q. When did you become satisfied of that?

A. Well, I—. It was after noon. It was possibly around 12 o'clock or shortly thereafter.

Q. And what was it that satisfied you?

A. Well, visible characteristics as we had been studying them.

Q. Is it fair to say that what satisfied you was that from [110] your observations through binoculars and your examination of the fingerprint cards and photographs that were on those cards, you reached the conclusion that two of the persons there sufficiently answered the description of the photographs on those two cards? Is that about right?

A. Well, that is approximately right. However,

(Testimony of Roy L. Erickson.)

one of the agents with us had seen them in person previously.

Q. Who was that?

A. Mr. Joseph McCann.

Q. Whom had he seen in person?

A. I believe he had seen both of them. I know he had seen Mr. Steinberg.

Q. He so advised you?

A. I knew it, yes, sure.

Q. When did you acquire that knowledge?

A. Oh, I probably knew that for years, couple of years.

Q. Did Mr. McCann accompany you—withdraw that.

If I understood your testimony correctly, Mr. Erickson, Mr. McCann accompanied you from San Francisco the prior day and was with you during the period of surveillance the following day?

A. I didn't say that, but he did, yes.

Q. It is true? A. Yes.

Q. How long, approximately after daybreak was it when [111] Steinberg first came out of the house and was visible to you?

A. We did not see him come out of the house or into the vicinity until just about noon.

Q. And did Mr. McCann say anything to you to the effect that he recognized Steinberg as the person who was coming out of the house?

A. Between that time and 12:30, yes.

Q. Had Mr. McCann, to your knowledge, been at the house prior to the 27th? A. No.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: I object to the question as being immaterial. Well, I think the answer was given before I completed my objection. I withdraw the objection.

Mr. Gladstein: Q. The answer was that he doesn't know or that Mr. McCann was there?

A. To my knowledge, he was not.

Q. Do you have knowledge who, if anyone, of the agents was at the house the previous day?

Mr. Schnacke: I will object to the question as being outside the scope of the direct examination, and immaterial to the issues of the case, and not a matter as to which any of the testimony of this witness bears.

The Court: Sustained.

Mr. Gladstein: Q. Now, after the—. By the way, Mr. Erickson, in giving your testimony yesterday concerning these [112] documents that were identified by you, you testified that particular ones came from a briefcase, expansion briefcase, that others came from some other briefcase, was it?

A. Yes. A small zipper style case.

Q. Small zipper style case? Some came from that, some came from a suitcase, some came from one of several boxes, and so on? A. Yes.

Q. I take it you made a report or record of the sources from which each of these documents was taken?

A. Well, we made a notation as to where each came when I removed them from the box.

Q. Who made the notation? A. I did.

(Testimony of Roy L. Erickson.)

Q. All right. And I suppose it is true, isn't it, that after the lapse of so many months you resorted to an examination of those notes or some report to refresh your recollection, didn't you, before you took the stand?

A. No, I haven't referred to any notes, reports, or anything as such, no.

Q. Well, we have all observed that while you were testifying you made no reference to any report or to any notations, as such. But my question was, did you before taking the witness stand, for the purpose of refreshing your recollection, examine the contents of a report, reports, or record or notations? [113] A. No, sir.

Q. So that all the testimony that you gave yesterday was solely and exclusively from a recollection of what took place on the 27th of August of last year?

A. Yes, plus the fact that, as I so testified, I removed those documents from the box they originally came in and turned them over to the United States Attorney, which was naturally of more recent date.

Q. Do any of these documents that you were asked to identify yesterday bear any notation or mark or contain anything that would indicate whether they were taken by you from a briefcase or from a box or from a suitcase or some other source? A. They do, yes.

Q. What is the method? A. Excuse me?

Q. What is the method?

(Testimony of Roy L. Erickson.)

A. As you will notice, on the original there is a letter near my initial and the date, on some of them. On others there is no letter. The letter or absence of the letter indicates to me the source from which the original came.

Q. Would you be good enough to explain that—— A. Sure.

Q. ——by reference to any of the exhibits that have been identified by you?

A. The Government's Exhibit 6 contains in the lower lefthand [114] corner my initials "RLE", and the date "8/27/53". And below that is the letter "L". That letter L indicates to me that it came from the search I conducted of the person of Mr. Ross. I did that for filing purposes, for organization purposes of the exhibits.

Q. You gave him the letter "L" at that time?

A. When I placed it—. At that time? No.

Q. Well, you didn't put your initials on that document at the time you took it off his person?

A. At the time I—yes, I did.

Q. Are they the same initials that the document now bears? A. Yes.

Q. May I see the one that you have reference to?

A. Sure. My initials "RLE" and "8/27/53", they were placed on there——

Q. At that time?

A. At that time, yes.

Q. Then I take it from your testimony that the letter "L" which appears below the date and

(Testimony of Roy L. Erickson.)

your own initials was added at some later date, is that right? A. Yes, sir.

Q. When?

A. That was added when I had placed them, all the documents, in separate folders in a lettering system in accordance with the box or suitcase or briefcase from which they came. Then, [115] in order that I could find some way of remembering it, I placed the letter on there.

Q. Where was that done?

A. In the office of the United States Attorney.

Q. Well, then, is that true about all of the documents that bear either a letter or some other mark to indicate by a symbol that you understand the source from which you took them?

A. Yes, sir.

Q. When did this occur, this marking in the United States Attorney's office?

A. That occurred last week. I am quite sure it was the 5th or 6th of the month.

Q. At the time that you did this, in what kind of container were these various exhibits? Were they in that file such as we have seen Mr. Schnacke handling? A. That's right.

Q. Was there anything in the file or on the exhibit itself prior to your placing a letter or other symbol on it that would indicate the source from which it came, that is, whether a suitcase, box, briefcase, or what?

A. That was identifiable in two ways.

Q. What were they?

(Testimony of Roy L. Erickson.)

A. One, I prepared that folder which Mr. Schnacke has.

Q. Yes. [116]

A. Two, I in preparing folders, placed them in the folders and placed a letter on the folder so I would know. That letter, for example, on Government's Exhibit 6 was the same, the letter "L".

Q. Well, let's take that as an illustration of your testimony. As I understand you now, you have told us that the letter "L" that appears on the exhibit itself numbered 6—— A. Yes?

Q. ——had a corresponding letter upon the folder that you or the United States Attorney provided for its being contained in?

A. Yes, sir.

Q. That was one. And what was the other method you say you used?

A. The other method was, when I had these photostated I placed on the photostat, for the use of the United States Attorney in his following the matter, a small 3 by 5 slip of paper with a notation. That was stapled to the photostat only.

Q. That was on these notations?

A. The source from which it came.

Q. Was that by means of a letter or a statement?

A. It was just a small typed note, that is all.

Q. And that was as to each exhibit?

A. That is right. [117]

Q. And what happened to the small typed note?

A. That was placed only on the copies, as I

(Testimony of Roy L. Erickson.)

said, the photostatic copies used for study by the United States Attorney.

Q. Are you referring to the same kind of—to the photostats that counsel has used here?

A. Yes.

Q. But, Mr. Erickson, those don't bear any words, any statements, any assertions on them to indicate the source from which they come, do they?

A. No, but I placed it on there when I took them from the original source, that is, the box, the suitcase or briefcase.

Q. Are you now referring to the time you were actually in the house?

A. I am referring to the time when I removed them from the box, suitcase or briefcase.

Q. When did that occur?

A. Oh, that occurred at a different time for each exhibit since last August.

Q. Then is it correct to say that the documents that you took from the house or cabin up there at Twain Harte did not remain at all times precisely in the box or other type of container in which you originally found them? That is correct, isn't it?

A. No. That is correct only to this extent: they did not [118] remain there after I turned them over to the United States Attorney, nor were those in the box at the time I turned over the photographs or had the laboratory examine them.

Q. Let me ask you this: isn't it a fact that these documents that you have identified, you

(Testimony of Roy L. Erickson.)

simply picked up and took with you in bulk or in mass from the premises on the day of the arrest?

A. Yes, sir.

Q. And isn't it true that you and the other agents of the FBI, indeed, removed, in substance, everything that was on those premises except pieces of furniture or matters of that kind that appeared to be a portion of the house?

A. Everything was removed except that which the realtor handling the house identified as the property belonging to him.

Q. When did that occur? A. Pardon?

Q. When did it occur that he identified things that were not removed?

A. I didn't handle that. I don't know.

Q. But it was some time other than the day of the arrest, or at least after you left the premises after the arrest?

A. Probably the next day, something like that.

Q. Was anything removed from the premises—withdraw that.

Up to and including the time when you and the other [119] agents took all of the defendants away from the premises on the 27th, did you or they take with you any of the contents of the house, papers, documents, personal belongings, and so on?

A. I took all of the contents of the house of that type with me when I left, yes.

Q. Well, perhaps my question was ambiguous. I would like to put it differently.

I understood you to say that some time after you

(Testimony of Roy L. Erickson.)

left an effort was made to find out from the realtor what belonged to the house, and that you left that and that everything else was removed, is that right?

A. Yes, sir.

Q. But that occurred after the 27th of August, and I think you said probably the next day?

A. I don't know.

Q. Wasn't that what you said?

A. Yes, that is what I said.

Q. I don't want to pin you down to whether it was one day after or two days after. It doesn't make any difference. I just want to make it clear if it is true you had all gone and dispersed from there and taken the defendants into custody, and it was some time after that, upon verifying from the realtor what belonged to the rest of the house, you then took all the other things, that is right?

A. The other things, that is right.

Q. What things did you take?

A. I took with me all of the boxes, suitcases and briefcases containing the documents I have testified about. I took with me the material that the—those papers which were in the two automobiles. And I took with me the mimeograph machine, I think. And that is all.

Q. To your knowledge, did you leave any papers, documents or materials of the general nature of the exhibits that have been offered here, or did you take those all with you?

A. To my knowledge, I took them all.

Q. All right. Prior to taking them that date,

(Testimony of Roy L. Erickson.)

did you, in the presence of the defendants, or any of them, or after they had left, make any examination or search through the documents and papers?

A. Would you repeat that?

Mr. Gladstein: Yes. Would you read the question, Mr. Reporter?

(Question read by the Reporter.)

Mr. Schnacke: I suggest that question is ambiguous, Your Honor please.

The Court: It is a little complicated.

Mr. Schnacke: How could it have been done in the presence of the defendants after they had left?

Mr. Gladstein: It is the condition, if the witness [121] remained there after they had left for a time. But I will accept the criticism and change it.

Mr. Gladstein: Q. I am trying to find out, Mr. Erickson, if your first search through and examination of these various papers and documents that you took occurred after you had taken them all from the house and brought them to your office in San Francisco, or whether any search and examination occurred at the house?

A. The first search was made at the house.

Q. You made that? A. Yes, sir.

Q. Did you remove any of those documents or papers from their containers?

A. No, sir. Well, excuse me. If I removed them, I removed them to read them or glance at it and put it back in the package.

Q. I see. So that you brought them—it is your testimony you brought them with you to your office

(Testimony of Roy L. Erickson.)

in San Francisco for a more detailed study and examination and search? A. That is right.

Q. And at the time you brought them, you brought them in the very same containers in which you found them on the premises?

A. Yes, sir.

Q. All right. Now, did you swear out a warrant or complaint [122] against any of the defendants?

A. Did I personally?

Q. Yes. A. No.

Q. Did you cause one to be done?

A. No.

Q. Do you know whether one was done?

A. Complaints were filed, yes.

Q. Where?

A. I believe they were filed here in San Francisco.

Q. When? A. The night of August 27th.

Q. With whom?

A. To my own knowledge, I would say I don't know.

Q. It was with the United States Commissioner, wasn't it? A. I presume so, yes.

Q. That is Commissioner Karesh, isn't it?

A. Yes, sir. [123]

Q. Can you tell us from your own knowledge of what the defendants were charged with in that complaint?

Mr. Schnacke: It has already been testified that this witness was not present when the complaint was filed.

(Testimony of Roy L. Erickson.)

The Court: If you want the records, you can get them. You do not need to take time asking somebody else what the records show.

Mr. Gladstein: Q. Mr. Erickson, you told us that certain photographs that you took represented the appearance of the house from certain angles or places that you have indicated, photographs that you took that very day. A. Yes, sir.

Q. Did you take any photographs of the area immediately surrounding the house?

A. I believe the photographs that you are referring to show the area surrounding the house.

Q. Let me put it this way: Are the five—I think it was five that were offered, and if I am wrong about the number, whatever the correct number is —of the photograph that you identified here yesterday or the day before, all of the photographs that were taken of the premises?

Mr. Schnacke: I will object to that as being immaterial, if Your Honor please. I do not know what difference it makes whatever other photographs he may or he may not have taken. These are the only photographs that were taken and the only [124] photographs to which he testified. I suggest it is outside the scope of the direct examination and immaterial.

The Court: If there are other photographs, it may possibly be material. Overruled.

The Witness: I took additional photographs. I believe the rest are of the interior of the house.

Mr Gladstein: That is what I was leading to.

(Testimony of Roy L. Erickson.)

Mr. Gladstein: Q. You did take photographs of the interior? A. Yes, sir.

Q. Did you take photographs of the interior of the house before moving or touching or displacing any of the contents, particularly the documents, brief cases, and so forth? A. Yes.

Q. Did you take photographs of each of the rooms—in other words, the entire interior of the house?

A. I tried to get a shot, a so-called shot of each room, yes.

Q. Were those photographs developed?

A. Yes, sir.

Q. Did you turn them over to the United States Attorney or do you have them?

Mr. Schnacke: I have them. I have sent upstairs to get them. If you care to examine them and introduce them, you certainly may.

Mr. Gladstein: I will go to another thing. [125]

Mr. Gladstein: Q. Are those photographs Mr. Schnacke has just referred to, and which you took of the interior, were they taken before any of the exhibits, documents, contents of the house were touched or moved?

A. They were taken—yes. I would have to qualify that only to the extent that while I was taking those pictures, during that period there was the natural, normal amount of confusion. Some of the persons had been changing clothes and things like that; individual agents handling the individual search of the person, or recovering material for

(Testimony of Roy L. Erickson.)

that person, may have been moved. Other than that, no.

Q. Documents, brief cases, or the cartons——

A. They would still——

Q. I beg your pardon?

A. They would not have been moved.

Q. You testified that typewriters were sent to Washington, D.C. A. No, I did not.

Q. Sent somewhere to a laboratory?

A. No, I testified that specimens of the type were taken from the typewriters for transmittal to the laboratory.

Q. I misunderstood you. And they were sent to Washington? A. Yes, sir.

Q. Were these the same specimens that you referred to yesterday? [126]

Q. When they were returned were they accompanied with some report of any kind?

A. I do not remember whether a report accompanied them or came separately.

Q. The report did come?

A. I presume so. I wouldn't have personally handled it.

Q. You had no personal knowledge of any such report, the contents of it?

A. The contents. I probably wouldn't have personal knowledge of it.

Q. Did you yourself send the specimens?

A. I sent them, yes.

Q. Did you send some document of inquiry concerning them? A. Yes, sir.

(Testimony of Roy E. Erickson.)

Q. What was the inquiry?

Mr. Schnacke: I object to that as immaterial and as an unreasonable inquiry into the techniques of the Federal Bureau of Investigation.

Mr. Gladstein: I am not concerned with the techniques of the Federal Bureau of Investigation. I am simply concerned with cross examining on a subject that the witness himself was asked to give testimony on and which he did.

Mr. Schnacke: On the further ground that it is hearsay.

The Court: It is not within the reach of the cross examination, I do not think. The witness was only interrogated [127] as to whether he sent these documents on. That is all. I suppose the Government may follow it up. I do not know. They may follow it up with something else.

Mr. Gladstein: Do I understand Your Honor will not permit me to examine as to the——

The Court: Your question now is what inquiry the witness made as to what he wanted to find out about the writing. I will hold that that is not material cross examination.

Mr. Gladstein: Q To get back a moment to photographs, not the ones I asked you about, did you observe that other agents besides yourself were taking photographs at and immediately after the time of the arrest?

A. No. I handled all the photography.

Q. Exhibits 2 and 3 are photographs. Did you take all of them, both of them? A. No, sir.

(Testimony of Roy L. Erickson.)

Q. Any of them?

A. Yes, I took the black and white.

Q. That is Exhibit 3? A. Yes, sir.

Q. Do you know when and where Exhibit 2 was taken?

A. Yes, sir, it was taken on Alcatraz Island on the day following the arrest, August 28th.

Q. That is No. 2? A. Both of them. [128]

Q. Maybe I am confused. There are three separate photographs on Exhibit 2. A. Yes, sir.

Q. Those are the ones to which you just referred in saying they were taken on Alcatraz?

A. Yes, sir.

Q. I understood you to say concerning the photograph on Exhibit 3, that you took that?

A. I did.

Q. When?

A. On Alcatraz, on August 28th.

Q. Then you made no photograph of the man whose photograph is seen in Exhibits 2 and 3 at the time of arrest?

A. I took the picture but it did not come out.

Q. You photographed each of the persons you found there? A. Yes.

Q. And fingerprinted each of the persons you found there?

A. I assisted in the fingerprinting.

Q. And the answer is as to all of them?

A. As to all of them.

Q. Exhibit 4, that is, photographs of the defend-

(Testimony of Roy L. Erickson.)

ant Steinberg, you took those at the cabin or at the house, didn't you? A. I did.

Q. No. 5 you may look at if you like and tell us where did you find that? [129]

A. As I testified on direct, I found that in the pockets of Carl Ross.

Q. Is there a mark on there that indicates that?

A. Yes, above my initial, the letter L.

Q. Does the letter L refer to things taken from the person of Ross? A. Yes, sir.

Q. What letter did you use for anything taken from the person of any other defendant?

A. I didn't take anything from the person of any other defendant.

Q. What other letters besides the L did you use in identifying these matters?

A. I used the letter M for one of the boxes at the foot of the bed, in the bedroom above the living room. I used the letter N for another, the letter Q for another. I used the letter O for the box that was on the dresser in the bedroom above the living room, the letter P for the box that was in the closet at the head of the stairway, the letter R for the zipper brief case on the dresser in the bedroom above the living room, the letter S for the suitcase in the closet in the bedroom above the living room, the letter T is for the suitcase that was on the bed in the bedroom above the living room, and I used no letter for the mass of material that was found in the expansion brief case on the bed in the bedroom [130] above the living room.

(Testimony of Roy L. Erickson.)

Q. No. 6 I think you said you found on the person of the defendant Ross? A. Yes.

Q. That is the list containing eggs and foodstuffs, is that so? A. Yes.

Q. Examine No. 7 if you will, Mr. Erickson. Where did you find that?

A. On the person of Mr. Ross.

Q. And No. 8? No. 8 you found in an automobile, didn't you? A. Yes, sir.

Q. I will ask you to look at the balance of these. Am I right in saying that commencing with the top exhibit, No. 9, that the remainder of those documents, and to the extent that they are documents—I think there are some photos as well—but the remainder of the documents there were taken not from the person of Ross or anyone else, is that right?

The Court: Is that up to No. 30?

Mr. Gladstein: All the remaining ones including those for identification. They go far beyond No. 30, Your Honor.

The Court: That goes to 77.

Mr. Gladstein: Perhaps this would be, if it suits Your Honor's convenience——

The Court: I made a record of it at the time. Do you [131] want to go through all of these again?

Mr. Gladstein: I only asked him a question.

The Court: He testified in the case of each one just where he found it, and my recollection is each one came from some box or suitcase or brief case,

(Testimony of Roy L. Erickson.)

and that he did not testify that any of them came from the person of Rasi. That was your question.

Mr. Gladstein: Or any of the other persons there. That was my question.

The Court: Or any of the other persons there.

The Witness: There were two or three documents I did take from the person of Mr. Ross.

The Court: Q. Included in this list?

A. Yes.

Q. Look through them.

A. Exhibit 7 is here. That was taken from his person.

Mr. Gladstein: I thought we commenced with No. 9, Mr. Erickson.

A. I have 7 here. I am sorry. The rest, the only way I can do is to check. I don't recall the identification number of the document, specifically where it came from, without looking at the document.

Mr. Schnacke: We will stipulate, Your Honor, after examining the record, that it is a fact that all exhibits from 8 on were taken from sources other than the person of someone [132] in the cabin.

Mr. Gladstein: That is satisfactory.

The Court: Q. Does that accord with your recollection pretty well?

A. To the best of my recollection, yes.

The Court: I made a note of that at the time the exhibits were entered. I could have made a mistake.

Mr. Schnacke: No. 8 was taken from the Chevrolet, 9 from the Ford, and so on.

(Testimony of Roy L. Erickson.)

Mr. Gladstein: One qualification I am sure Mr. Schnacke should agree to, and I think it would accord with the witness' recollection: There is an exception to the witness' testimony. For instance, I notice Exhibits 29 and 30, which represent his own typewritten specimens.

Mr. Schnacke: They were not taken from the person of anybody found at the cabin.

Mr. Gladstein: Q. Examine if you will No. 31 for identification, Mr. Erickson. Where did you find that?

A. 31? In a box on the dresser in the bedroom above the living room.

Q. Do you know to whom it belonged?

A. Do I know? No.

Q. Do you know to what use, if any, it was ever put?

Mr. Schnacke: I will object to that as calling for an opinion and conclusion of the witness. [133]

The Court: It does call for his opinion and conclusion. I think you could reframe that, however, and ask him if he knows of his own knowledge what was done with it, except what he did with it, something like that. I'm just trying to avoid——

Mr. Gladstein: I will adopt Your Honor's form of questioning.

Mr. Gladstein: Q. Mr. Erickson, except for what you did with the document after you took it, do you know what was ever done with it prior to that time?

A. No, sir.

Q. Or by whom it was known to or used by?

(Testimony of Roy L. Erickson.)

A. No, sir.

Q. Or when it came into existence?

A. No, sir.

Q. Or where? A. No, sir.

Q. Or when it first came to the house of Twain Harte? A. No, sir.

Q. Or by whom it was brought there?

A. No, sir.

Q. Or where it came there through the mail?

A. No, sir.

Q. Did you ever ascertain or do you know if the contents of this exhibit were ever known to my client, Mrs. Blau? [134] A. No, sir.

Q. Or Mrs. Kremen? A. No, sir.

Q. Or any of the other persons arrested there?

A. No, sir.

Q. If I asked you the same series of questions concerning each of the exhibits numbered from 32 on, including 77, would your answers be the same?

A. I would say yes.

Mr. Gladstein: Would Your Honor consent to a recess at this time, a morning recess? I think I have only a few questions of Mr. Erickson and I should like to check my notes. I may have concluded my examination, but I would like to consult with Mr. Leonard?

The Court: All right. I do not know whether I did tell the jury before, but we make a practice of taking a brief recess in the mid-morning and mid-afternoon. During those periods of your absence from the courtroom during recess, as well as when

(Testimony of Roy L. Erickson.)

you go home at night or come back in the morning or at noontime, you are still under the same admonition not to discuss the case among yourselves or let anybody else talk to you in any manner, shape or form or express an opinion until the matter is submitted to you.

We will take the usual mid-morning recess at this time.

(Recess.) [135]

Mr. Gladstein: Shall I proceed, Your Honor?

The Court: Yes.

Mr. Gladstein: Q. Mr. Erickson, I have been handed during the recess photographs that Mr. Schnacke brought down, and which I will ask you——

Mr. Gladstein: I suppose these should be marked for identification. I guess as a group would be satisfactory, Your Honor.

The Clerk: Defendant's exhibits, Mr. Gladstein?

Mr. Gladstein: Yes.

(Thereupon group of documents referred to above were marked Defendants' Exhibit A for identification.)

Mr. Gladstein: Q. I hand you a group of photographs that the Clerk has marked Defendants' Exhibit A for identification. Do you recognize those as photographs that you took and about which you have given testimony, any you took of the inside of the house at Twain Harte? A. Yes, sir.

Q. Are they all of the photographs that you took of the inside of the house?

(Testimony of Roy L. Erickson.)

A. I believe they are, yes.

Q. Now, the one on top——

Mr. Gladstein: I suppose these should be marked if I am going to ask questions separately about some of them. I [136] believe they should be given numbers 1, 2, 3, and so forth.

The Court: Suppose you have them marked in the order in which they are fastened together?

Mr. Gladstein: All right, I think I will ask the Clerk to mark them on the back or on the corner so there will be no confusion in the record.

The Clerk: The first photograph, Mr. Gladstein, is marked A, and the others are marked A-1 to A-14, inclusive.

Mr. Gladstein: Thank you very much.

(Thereupon group of photographs marked Defendants' Exhibit A for identification were individually marked Defendants' Exhibit A and Defendant's Exhibit A-1 through A-14 for identification.)

Mr. Gladstein: Q. The one on top is marked A, Mr. Erickson. What is that a photograph of?

A. That is a photograph of the living room on the first floor, taken from the dinette area.

Q. And at the time that you took it had anything, to your knowledge, been disturbed in the area that is shown in the photograph?

A. The only thing that may have been disturbed was, as I said, during changing into clothes, and so forth, by the defendants prior to departure. Otherwise, no.

(Testimony of Roy L. Erickson.)

Q. But in that picture itself, as you examine it, would you [137] say that that correctly represents substantially the appearance of that part of the house at the time the agents first entered it?

A. Yes, sir.

Mr. Gladstein: May I hold this up for the jury to look at, Your Honor?

The Court: Certainly.

Mr. Gladstein: Ladies and gentlemen, this is a photograph of a portion of the living room (displaying exhibit to the jury).

Mr. Gladstein: Q. Now, A-1. What does that represent, or what is it a photograph of?

A. That is a photograph of the living room area taken from the opposite corner as the previous one, or from the corner leading from the bath.

Q. Is that a picture of a portion of the same room? A. That's right.

Mr. Gladstein: Ladies and gentlemen, this is the portion of the living room that Mr. Erickson has just testified to (displaying exhibit to the jury).

Mr. Gladstein: Q. Now, the next photograph is marked A-2. What is that a photograph of?

A. That is a photograph of what on the chart would be marked the utility room, taken from the entrance itself. In other words, you open the door and that is what you see looking in. [138]

Mr. Gladstein: I now hold that up, ladies and gentlemen (displaying exhibit to the jury).

Mr. Gladstein: Q. Now would you look at Exhibit 3 and tell us what this is a photograph of?

(Testimony of Roy L. Erickson.)

A. A-3 is a photograph taken from the lixing room into the dinette area, showing the doorway on the extreme left, the dinette area with table, chair, and the box containing the mimeograph machine.

Q. And was that taken prior to and without anything in that area being disturbed by any of the agents?

A. That is right, other than what I have mentioned before, might have been disturbed.

Q. And I neglected to ask you if the prior photographs that you have already told us about, if it is true about them, also that nothing in the area was disturbed by the agents?

A. Yes, sir.

Mr. Gladstein: This, ladies and gentlemen, is the area that the witness has just identified (displaying exhibit to the jury).

Mr. Gladstein: Q. What did you say that represented Mr. Erickson?

A. It is a photograph of the dinette area of the house taken from the living room, showing on the extreme left the entry to the portion, the table in the dinette, with the box with the mimeograph machine. [139]

Q. That is the box that contained the mimeograph machine? A. Yes, sir.

Q. And over on the other side, those are phonograph records, are they not?

A. They were albums of phonograph records, yes, sir.

(Testimony of Roy L. Erickson.)

Q. And the next one, Exhibit A-4?

A. This was taken when I was about to leave. As I recall, I had another film left in the pack, and there had been that camping equipment and fishing equipment, and so forth, near the wall of the dinette nearest the kitchen, and we had just placed it in a bunch so it could be placed within the confines of the photograph.

Q. Then, in other words, the things shown in this photograph were placed there by the agents? That is to say, for instance, a bottle—well——

A. It is slightly out of focus, yes.

Q. Apart from being out of focus, there is a carton marked "Budweiser"? A. Yes.

Q. And then there is camping equipment and fishing equipment? A. Yes.

Q. And there seems to be a bottle of some kind, right? A. Yes.

Q. And another bottle that looks like a liqueur bottle? A. That is right. [140]

Q. Am I correct that these things in this photograph, A-4, were taken from various parts of the premises and put together so that they could be within the compass and focus of your remaining film?

A. After I had completed taking the pictures, just before I left, those were in and around the kitchen area and dinette area there, and they were placed right along the wall nearest the kitchen area and dinette, for the purpose of taking the photograph.

(Testimony of Roy L. Erickson.)

Q. Yes. So that, in other words, the photograph itself, A-4, does not show these items therein exactly as you found them, isn't that right?

A. That is right.

Mr. Gladstein: I will hold that up for the jury (displaying Exhibit to the jury).

Mr. Gladstein: Q. What is the next one? A-5.

A. That is a photograph, the best I could do, from the bed in the bedroom above the living room side of the house into the closet area which I mentioned existing, and which contained several suitcases, one of which contained some documents. And the one which contained the documents is the one on the extreme left. You can just see it in the corner.

Q. Were there any documents in the other suitcase shown there? A. No, sir. [141]

Q. Were there any documents in what appears to be a field pack type? A. No, sir.

Mr. Gladstein: Ladies and gentlemen—watch me, Mr. Erickson—as I understand the witness, it is this portion of the suitcase shown in the corner that contained some documents.

The Witness: Yes.

Mr. Gladstein: Q. This picture taken, does it show the area and contents of it exactly as you found it before any agents disturbed it?

A. Yes, sir.

Mr. Gladstein: (Showing exhibit to the jury.) You may ask for these later to examine them in

(Testimony of Roy L. Erickson.)

greater detail, if you like. I am sure his Honor will permit that.

Mr. Gladstein: Q. The next is Exhibit 6.

A. That is a photograph taken from about the same position as the other one, of the dresser which is in the bedroom above the living room side of the house, and containing that box which was unmarked, and the zipper briefcase.

Q. Did the zipper briefcase contain any documents? A. Yes.

Q. That is the one you have referred to?

A. Yes.

Q. Does that photograph as it is shown there represent a [142] portion of the area you have described of those premises and what is shown there without any disturbing of those items or moving of them generally by the agents?

A. That is right, yes.

(Exhibit A-6 displayed to the jury.)

Mr. Gladstein: Q. The next is Exhibit A-7. What does that show?

A. That is the best I could do of a picture from the doorway leading into the bedroom above the living room side of the house, and trying to show as much as I could of that bedroom. It shows the bed, some clothing there, and on the extreme right-hand corner you can see the dresser. On the bed you can see one suitcase and one expansion type briefcase.

Q. What did the suitcase contain?

A. The suitcase contained some documents.

(Testimony of Roy L. Erickson.)

Q. And the briefcase is also the one you referred to as containing some documents?

A. Yes, sir.

Q. Did you find all the items, that is, the suitcase and the expansion briefcase in that photograph, exactly as the photograph shows?

A. Yes, sir.

Q. Without any prior disturbance or moving of any of the items by anybody, is that right? [143]

A. That is right, yes. Other than—on all of these I would qualify that. Other than what someone might have moved in changing into new clothes, or something of that kind.

Mr. Gladstein: Very well. This, ladies and gentlemen, is the photograph Mr. Erickson has just identified now, (displaying exhibit to the jury).

Mr. Gladstein: Q. The next one?

A. That is a photograph from the bottom of the stairway looking up into the head of the stairway and the closet I mentioned existing on the second floor at the head of the stairway. It shows clothing in there is about all you can see.

Q. And that photograph was taken prior to any of the articles shown in this photograph being disturbed by anyone? A. That is right.

(Exhibit A-8 was displayed to the jury.)

Mr. Gladstein: Q. What is the next, sir?

A. This is a photograph from the doorway—the doorway to the bedroom on the kitchenside of the house, trying to show the condition of that room as best I could.

(Testimony of Roy L. Erickson.)

Q. Now, those articles and items shown in that picture, were they so placed there in that position without any prior moving or disturbance by the agents? A. Yes.

Q. You are positive of that? [144]

A. Unless, as I previously said, there was some change there when people changed into other clothing.

Q. How long after the defendants were placed under arrest did you make these interior photographs?

A. I made them after they were photographed —after the defendants were photographed and fingerprinted and before they actually left the scene, in the cars.

Q. Did you make these photographs before or after various items of clothing were taken from the house to enable the defendants to wear them in the course of the drive back?

A. Some of them may have been taken before some of the defendants did change. Some of them were taken after they changed.

Q. And can you tell us specifically about A-9, whether you took that photograph on the second floor before or after the room had been used for the purpose of changing clothes?

A. Well, to the best of my recollection it would have been taken after they changed clothes.

Q. And so the position of the various items, including particularly the things that are strewn all over the bed, that doesn't represent the way the

(Testimony of Roy L. Erickson.)

room looked before things were moved around in it after the arrest, isn't that right?

A. Oh, no. Yes, it represents the way the room looked when we arrived, except for what may have been dropped there, what may have been picked up in the changing of clothes. In other words, the material that exists there, as it exists [145] in that photograph, existed there when we arrived.

Q. You mean in the room?

A. In the room, yes.

Q. But not necessarily in the positions they are shown here to be, that is, on the bed, and so on, isn't that right?

A. If they were moved, they could have been moved minorly in someone changing clothes, brushing aside of clothes.

Q. What did you find in this carton or box, if anything? A. That was empty.

Mr. Gladstein: I will show you, ladies and gentlemen, this last photograph (displaying Exhibit to the jury).

Mr. Gladstein: Q. The next photograph is A-10. Can you tell us what that depicts, if you will?

A. This is a photograph of the closet from the bed in the bedroom above the kitchen side of the house.

Q. And it shows in an undisturbed state the things you found there in that area? A. Yes.

Mr. Gladstein: I will hold that up (displaying exhibit to the jury).

Mr. Gladstein: Q. Next is A-11.

(Testimony of Roy L. Erickson.)

A. This is a photograph of the kitchen taken from what would probably be the dinette area of the house.

Q. It shows it in the same condition in which you found it, without disturbance? [146]

A. Yes.

(Exhibit A-11 was displayed to the jury.)

Mr. Gladstein: Q. Now, I come to A-12. What is that?

A. That is a photograph of a pair of pants that was found in the living room by another agent, and it was taken because money was found in the belt.

Q. You found money in the belt? Who found the money in the belt? A. Agent Dunker.

Q. And the picture was taken, then, the trousers and the belt and the money contained in it—in the belt, that is—were arranged by an agent for the purpose to show those things, isn't that right?

A. Yes.

Q. The photograph as taken doesn't really show the correct appearance of the trousers and the belt as you found them, does it? A. No.

Q. This is what you might call a staged picture, is it not?

A. It was placed there to show the pants and the belt on which the pants were contained and the fact that money was in the belt.

(Exhibit A-12 was displayed to the jury.)

Mr. Gladstein: Q. And the next picture, sir, is A-13.

A. And this is a photograph I took after remov-

(Testimony of Roy L. Erickson.)

ing the [147] mimeograph machine from the box that was previously shown, and the opening of the box containing the items used in supplying the mimeograph machine.

Q. You had to move the items shown here from other portions and bring them together in order to take this photograph, did you?

A. Yes. The mimeograph——

Q. What was your answer?

A. Yes. The mimeograph machine was in the box. I removed it to photograph it.

Q. And the paper, you had to bring that to this area on there and put these items in proximity to each other so that you could get them all into one film, isn't that right? A. Yes.

Q. Do you remember from where you obtained and brought the paper or the box containing the paper?

A. They were sitting just next to the box containing the mimeograph machine on the table.

Q. So, in other words, they were taken off the table and unwrapped and placed on the floor?

A. Yes, sir.

Q. That too, then, is a staged photograph, isn't that right? A. Yes, sir.

(Exhibit A-13 displayed to the jury.)

Mr. Gladstein: Q. A-14 is the last of the photographs, [148] and what does it portray?

A. This is a photograph of the desk in the living room, taken from the opposite side of the living room, showing generally the contents in there of the

(Testimony of Roy L. Erickson.)

desk, and I think you can see the typewriter down under the desk. That is about all.

Q. When you found that desk were the drawers like that, or did you or some other agent open the drawers so you could get a photograph that showed the contents as well as the desk?

A. The middle one was partly open. However, I pulled it out to show the contents.

Q. By the way, can you tell—you can tell us what the contents were? What were they?

A. Maps, phonograph records, some papers, documents, cards. That is about all.

Mr. Gladstein: I offer these in evidence, if Your Honor please.

The Court: Very well, they may be admitted.

(Thereupon photographs previously marked Defendants' Exhibits A through A-14 for identification were received in evidence.)

Mr. Gladstein: That is all.

The Court: They should have been admitted first, but that is all right.

Mr. Gladstein: I am sorry. [149]

Redirect Examination

Mr. Schnacke: Q. Mr. Erickson, the question was raised whether *the* fingerprinted and assisted in the fingerprinting of various of the persons found in the cabin. It is my recollection that you said you did, is that right? A. Yes, sir.

Q. I will show you four cards appearing to bear

(Testimony of Roy L. Erickson.)

fingerprints and ask you if you can identify those and tell us what you know about them?

A. Yes, Special Agent Howard Richardson and I together fingerprinted each of the defendants at the cabin. These are the prints we together took of Shirley Kremen, Carl Ross, Samuel Coleman and Robert Thompson.

Q. I notice that three of these cards are signed by Agent Richardson and one of them by yourself. I understand, nonetheless, you were present and cooperated in the taking of these prints, is that correct?

A. Yes, it was a small table we were working on. One had to hold the card while the other was rolling the prints.

Q. I will show you the first of the documents to which you refer and ask you if that document contains the true fingerprints of Shirley Kremen?

A. It does.

Q. Shirley Kremen is the young lady sitting at the defendants' table who has previously been described. [150]

Mr. Gladstein: Excuse me for interrupting. I would like to have leave to move to strike the prior answer and make an objection which may be deemed to have been made prior to the answer. I think the question called for his opinion and conclusion as formulated. I may be mistaken about that. If he says that he identifies that as something he saw taken from a defendant, that is one form of question; otherwise——

(Testimony of Roy L. Erickson.)

The Court: That is what he asked him.

Mr. Schnacke: I asked him if they represented the true fingerprints of the defendant Shirley Kremen.

The Court: Q. You saw her put her fingerprints on the card, is that it?

A. I rolled them on the card, yes.

Mr. Gladstein: That card. That is all I wanted to know.

Mr. Schnacke: I ask that that document be admitted into evidence as Government's next in order solely for the purpose of establishing the true fingerprints of that defendant, and without offering it as to any other matter on the card other than the name of the defendant and the fingerprints.

Mr. Gladstein: Your Honor, I think they are incompetent, irrelevant and immaterial at this point. I think they are objectionable.

The Court: It is a circumstance, it is a fact that we cannot evaluate until we have some other facts. They cannot put everything in all at one time. [151]

Mr. Gladstein: I understand that, but I should like to protect the record for Mrs. Kremen. I think it is not appropriate without some proper foundation being laid, and it is prejudicial. I object to it.

Mr. Schnacke: There has already been testimony that the prints were taken and these are the prints taken.

Mr. Gladstein: If that is so there is no occasion to offer the prints.

Mr. Schnacke: They may want to use them for

(Testimony of Roy L. Erickson.)

some other purpose. I do not know. I am not presenting the case. They may be admitted.

(The fingerprint cards referred to above were thereupon received in evidence and marked Government's Exhibit No. 78.)

Mr. Schnacke: Q. I will show you the second of the cards you previously identified. Will you tell me what that card represents?

A. These are the fingerprints taken, placed on the paper, of Carl Ross.

Mr. Schnacke: I will offer that in evidence as Government's Exhibit next in order for the same purpose.

Mr. Gladstein: May we have the same objection?

The Court: Admitted for the same purpose.

(Whereupon the fingerprint card referred to above was received in evidence and marked Government's Exhibit No. 79.) [152]

Mr. Schnacke: Q. I will show you the third of the cards you identified and ask you if you will describe what that card represents?

A. These are the fingerprints placed on the paper for Samuel Coleman.

Mr. Schnacke: For the same purpose I will offer that card in evidence as Government's Exhibit next in order.

Mr. Gladstein: Same objection.

The Court: Same ruling.

(Whereupon the fingerprint card referred to above was received in evidence and marked Government's Exhibit No. 80.)

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. I will show you the fourth of the cards you identified and ask you if you will describe that?

A. These are the fingerprints from the fingers of Robert Thompson and placed on the card.

Q. That is the Robert Thompson whom you previously identified as being present at the cabin at the time of the arrest, is that it?

A. Yes, sir.

Mr. Schnacke: I will offer that in evidence as Government's next in evidence for the same limited purpose.

Mr. Gladstein: I will object to that on behalf of each and everyone of the defendants, severally and individually, and for the additional reason they are incompetent, irrelevant [153] and immaterial. They are not probative of any issue in the case.

The Court: It may be necessary to establish the identity of this man whose name is mentioned in the indictment.

Mr. Gladstein: I understand what the problems of the prosecution are under the law, but I think there is no foundation for a reception of this in evidence and I think it is prejudicial. It does not involve the defendants as such.

The Court: Overruled. It may be admitted.

(The fingerprint card referred to above was thereupon received in evidence and marked Government's Exhibit No. 81.)

Mr. Schnacke: Q. Mr. Erickson, I will call your attention to Defendants' Exhibit A-13, to which you

(Testimony of Roy L. Erickson.)

previously referred, that being the photograph of the mimeograph machine, and I will ask when you observed that mimeograph machine for the first time at the cabin if those cans of ink or either of them that are depicted there were open or sealed closed? That is, had the seal been broken on them? Were they new, unused cans or had they previously been opened?

A. They had previously been opened.

Q. And the mimeograph machine I understand was contained in a box when you first observed it?

A. Yes, sir.

Q. Was that box sealed tight? [154]

A. No.

Q. Had the mimeograph machine been inked prior to the time that you saw it, or was the machine entirely dry and shiny new?

Mr. Gladstein: If Your Honor please, that calls for a conclusion. He may state what he observed.

The Court: Yes. What was the condition?

The Witness: It appeared to have been a used machine.

Mr. Gladstein: I object to that.

The Court: Strike the answer out.

The Court: Q. What do you mean by that? Do you mean by that it was a new machine or what we speak of as a used machine, or what are you trying to tell us, that there was anything to show us it was freshly used? Is that what you are trying to get at?

Mr. Schnacke: I am trying to find out if the

(Testimony of Roy L. Erickson.)

inked cylinder, either interior or exterior, was wet and had been inked.

The Witness: It had been inked.

Mr. Schnacke: That is all.

Recross-Examination

Mr. Gladstein: Q. Mr. Erickson, you testified on redirect examination that you were present and observed the taking of fingerprints from four people, and you have named them.

A. I either observed it—I assisted in it and I took some of them. [155]

Q. There were five people taken into custody at that house and you have not named Sidney Steinberg as one of the persons whose fingerprints were taken, have you? A. No, I have not.

Q. Were they taken? A. Yes, sir.

Q. So that the five people who were there were fingerprinted? A. Yes, sir.

Q. Did you take any other fingerprints at or inside that cabin of any kind of any person, either from the person personally or from any other thing in the house at that time? A. I did not.

Q. Did you see anybody else do so at that time?

A. At that time, no.

Mr. Gladstein: That is all.

Mr. Schnacke: That is all.

Mr. Gladstein: I neglected to ask the usual rule excluding the witnesses. May I ask the Court to do that?

The Court: I do not know now. It is very dif-

ficult to do that. I do not know what witnesses have been here.

Mr. Gladstein: I appreciate that, and since it was I who was at fault, I am not going to raise any objection to anybody having been here.

The Court: Do you have any witnesses in the room now?

Mr. Schnacke: I do not know, Your Honor, whether there [156] are any here or not. We have not instructed them to stay out of the courtroom, and many of the witnesses have no place else to stay that provides any degree of interest for them. I do not think any showing has been made of any necessity for witnesses being excluded, and I respectfully oppose the motion. I think it is within the Court's jurisdiction whether to exclude them or not.

The Court: Are there any witnesses present?

Mr. Schnacke: (Turning to the audience in the courtroom) Is there anyone here subpoenaed as a witness in this matter?

There are some agents of the Federal Bureau of Investigation. I notice them in the back row. They are to be next called as witnesses, but other than they, I see no one else.

The Court: After this have the witnesses come into the witness room instead of into the courtroom. That applies equally in the case of the defense witnesses.

Mr. Schnacke: May we have one exception to that, Your Honor please? Mr. Erickson, who has worked so hard on this case, is essential at the counsel table with me.

Mr. Gladstein: No objection.

The Court: Call the next witness.

Mr. Foster: If Your Honor please, I think this is as good a time as any to start offering some of the documents that were marked for identification yesterday.

Mr. Gladstein: Your Honor, I would like to say that I [157] apprehend that these offers—I stayed up quite late reading some of these exhibits for identification. That is what Mr. Foster refers to. I have some authorities I would like to submit to the Court, and I apprehend the Court would not want counsel to argue law in front of the jury, and so I make the suggestion that we do it in the jury's absence.

The Court: I am not too overwhelmed by this problem. What is the point of offering these documents in evidence at this time? I am referring now to the long list of documents that were in various boxes that witnesses testified to. You have them identified. They are here now, and I could not admit them in evidence for exhibition to the jury, for the jury to see them, until there is some further relationship established.

Mr. Foster: If Your Honor please, perhaps Mr. Gladstein was right and we should argue that in the jury's absence.

Mr. Gladstein: I am satisfied with Your Honor's present ruling at this time. I do not want to argue, Your Honor, in view of that.

Mr. Foster: Very well. We will wait until a later time.

The Court: It is pretty early. I suppose you will have other data in the case. I assume so. They won't get lost. They have been marked for identification. They could be admitted for the limited purpose of establishing that they were documents that were obtained at a certain place and under certain circumstances, but that is just another way of marking [158] them for identification.

Mr. Schnacke: I respectfully suggest that they are properly admissible at this time, but I will follow Your Honor's advice and lay a further foundation for the documents.

The Court: The Judge always has an easier time when he has more of a record to rule on. We are asked to decide too many academic questions too soon.

Mr. Schnacke: Yes, Your Honor.

JOSEPH P. McCANN

called as a witness on behalf of the Government, and having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and jury?

A. Joseph P. McCann.

Direct Examination

Mr. Schnacke: Q. Mr. McCann, what is your occupation?

A. Special Agent of the F.B.I.

Q. Where is your duty station?

(Testimony of Joseph P. McCann.)

A. New York City, New York.

Q. How long have you been assigned to that station? A. Approximately six years.

Q. How long have you been with the Federal Bureau of [159] Investigation?

A. As Special Agent 8 years.

Q. Do you know the defendant in this case, Sidney Steinberg? A. Yes I do.

Q. For how long have you known him?

A. Intermittently since November 1950.

Q. That was the first occasion on which you saw him? A. I believe that was.

Q. Since November 1950, approximately how many times have you seen the defendant Steinberg?

A. Prior to August 1953 about six or seven times.

Q. You see the defendant Steinberg in court here this morning, do you? A. Yes, sir.

Q. Sitting at the defense table?

A. Yes, sir.

Q. Will you compare to the best of your ability his present appearance with the appearance that he had at the time that you were first acquainted with him or first saw him?

Mr. Gladstein: I am going to object to that because of the form of the question, asking for a comparison.

The Court: I think the objection is good. The witness can state, of course, what the description of him was at one time and his description at another time.

(Testimony of Joseph P. McCann.)

Mr. Gladstein: That is what I have in mind, Your Honor. [160]

Mr. Schnacke: Q. Will you describe defendant Sidney Steinberg as he looked when you first saw him, to the best of your ability?

A. When I first saw him he was approximately 165 pounds, around that weight. He was heavy. He had a full face and a heavy build. His hair grew long. Of course, his hair was black. He was approximately five feet six inches in height, sallow complexion, light complexion.

Q. On the day of August 27th, 1953, did you see the defendant Steinberg? A. Yes, sir.

Q. Where did you see him?

A. In the vicinity of the cabin located at Twain Harte, California.

Q. At what time of that day did you first observe him?

A. I observed him at approximately 12:00 noon below the hill where I was stationed in the yard, parking area near the house.

Q. From the time you first observed him on that day until you spoke with him for the first time on that day, if you spoke with him on that day, will you tell us what you did?

A. I first saw him approximately 12:00 noon and also observed other people in that same area around that yard. I saw Mr. Thompson, Mr. Coleman and the others, and at approximately 12:30, when we on the hill were satisfied that two of the individuals

(Testimony of Joseph P. McCann.)

below were Mr. Thompson and Mr. Steinberg, on whom [161] there was process outstanding——

Mr. Gladstein: I'm going to object to that.

The Court: That last statement, "on whom there was process outstanding," may go out.

The Witness: Well, two individuals that were known to us as fugitives.

Mr. Gladstein: I am going to object to that, if Your Honor please. Also I would like to suggest that this is not responsive to the question. The question asked him to describe the appearance of a person.

Mr. Schnacke: I asked him what he did at the time he first saw them.

Mr. Gladstein: Excuse me. I have a motion to strike "known to us as fugitives."

The Court: That last part I do not think is objectionable.

Mr. Schnacke: Q. In any event, you saw the two persons whom you were able to identify at that time as Steinberg and Thompson?

A. That is right.

Q. When had you first in your career observed Thompson?

A. I observed him in New York City during 1950 and 1949, I believe, too.

Q. During those years approximately how many times had you seen him?

A. Numerous occasions. [162]

Q. Would you describe Mr. Steinberg's appear-

(Testimony of Joseph P. McCann.)

ance on the occasion that you saw him at the Twain Harte cabin?

A. He was, I would say, approximately 125 pounds to 130 pounds in weight. His hair was the same color as previously but was cut short. He was much thinner, both his face and his body, and he had grown a moustache.

Q. I will show you Plaintiff's Exhibit 4 and ask if that corresponds to your recollection of Mr. Steinberg's appearance when you saw him at the Twain Harte cabin? A. Yes, it does.

Mr. Schnacke: If Your Honor please, may this be passed by the jurors one to the other in order that they may compare this with the present appearance of the defendant Steinberg, who I will ask to stand for just a moment so the jury can see him?

The Court: I do not think you need to stand. Remain seated. The jury can see him from there. Do you wish to pass the photographs?

Mr. Schnacke: Yes, Your Honor.

(The photograph referred to was thereupon passed to the jury.)

Mr. Schnacke: Q. Mr. McCann, will you describe Robert Thompson's appearance during the years 1949 and 1950 when you were acquainted with him?

A. He was approximately, as I recall, five feet ten inches in [163] height, about 180 to 190 pounds, long brown hair, fairly stocky build. That is about it.

(Testimony of Joseph P. McCann.)

Q. Will you describe his appearance as you saw him on August 27th, 1953?

A. In August 1953 he was, I would estimate, much heavier than when I first saw him. Probably weighed about 210, possibly 220. This hair was red. It appeared to be dyed. It was cut short. He also had a light strawberry blond moustache. He was very stocky in appearance. He had a very large stomach.

Q. What color were his eyebrows?

A. I believe they were strawberry blond too.

Q. I will show you Government's Exhibit No. 2 and ask if that correctly reflects the appearance of Robert G. Thompson when you saw him on August 27th, 1953? A. Yes, sir, it does. [164]

Q. Does that resemble the Robert G. Thompson —withdraw that question.

Mr. Schnacke: I might show this to the jury in this fashion, Your Honor, rather than pass it around. (Displaying exhibit to the jury.)

The Court: Well, it is a little difficult for the jury to see. I meant to tell you that before.

Mr. Schnacke: The light is bad.

The Court: I think it would be better to pass it, thank you.

(Exhibit passed to the jury.)

Mr. Schnacke: Q. Did you have a conversation with the defendant Sidney Steinberg on the 27th of August? A. Yes, I did.

Q. And at the Twain Harte cabin?

Mr. Gladstein: Pardon me. I am going to ask

(Testimony of Joseph P. McCann.)

that the questions, in view of the answer, not be leading from now on.

The Court: I don't know. I never can tell what a lawyer is going to ask.

Mr. Gladstein: He has already asked it, Your Honor.

Mr. Schnacke: Are you objecting to a question I have asked?

The Court: Well, go ahead.

Mr. Schnacke: Q. Where did that conversation take place, Mr. McCann? [165]

A. In the yard outside the cabin at Twain Harte.

Q. And about what time of day was that?

A. It was approximately 1:05 p.m.

Q. That was at about the time of the arrest that was testified to by Mr. Erickson?

A. Yes, sir.

Q. What had you done immediately before that time?

A. Immediately before that time the other agents on the hill and myself had come down the hill and entered the yard of the cabin and met with the arresting party coming from the other direction.

Q. And as you came onto the cabin area proper, where did you go?

A. I went to Mr. Steinberg.

Q. At the time of this conversation to which you have referred, who else was in your immediate presence? A. Agent Carlisle.

Q. Anyone else?

(Testimony of Joseph P. McCann.)

A. The special agent in charge was in the yard.

Q. What was the nature of the conversation you had with Mr. Steinberg? What did you say and what did he say?

A. I asked Mr. Steinberg who he was.

Mr. Gladstein: Excuse me. I am going to ask Your Honor to rule that any such conversation is admissible only concerning the defendant Steinberg. [166]

The Court: Have you established where the other defendants were? Well, I think we will follow that rule insofar as the conspiracy count is concerned, Mr. Schnacke, until a later stage in the proceedings. The testimony, when it obviously refers to one defendant, would only be admitted as to that one defendant.

Mr. Gladstein: That is what I had in mind.

Mr. Schnacke: We will make the appropriate application at a later time.

The Witness: A. I asked Mr. Steinberg who he was. He said, "You know who I am." And then I said, "Sidney Steinberg," and he said, "Yes."

I advised him that he was under arrest, as he had previously been advised, for violation of the Smith Act.

Mr. Gladstein: Just a moment, if Your Honor please. I ask the last part be stricken as to "he had previously been advised."

The Court: Maybe that is what he said. I don't know. You will have to develop that.

Mr. Gladstein: Well——

(Testimony of Joseph P. McCann.)

The Court: I can't tell from the answer.

Mr. Schnacke: The answer was that that was the text of the conversation.

The Court: Was that what you said to him?

The Witness: A. No, sir, I did not say "as previously [167] advised him." I merely said to him, "You are under arrest for violation of the Smith Act."

The Court: The other part of the answer may go out.

Mr. Gladstein: Thank you, Your Honor.

Mr. Schnacke: Q. What did you do in connection with defendant Steinberg at that time?

A. I ordered him to raise his hands and put them against a tree, and then I searched his person.

Q. How was he dressed at that time?

A. At that time he was dressed in blue denims and blue canvas shoes with crepe soles.

Q. What if anything did you discover on the search of his person?

A. I discovered merely some tissue paper in one of the pockets of his denims.

Q. Did you have a further conversation with him?

A. A short time after that I asked him if he had any personal possessions——

Mr. Gladstein: Just a second. The answer was "Yes," and then I want to ask that counsel establish the proper foundation.

The Court: All right.

Mr. Schnacke: Q. You say this was a short

(Testimony of Joseph P. McCann.)

time after the search. Now, were the same persons present and was the circumstances the same as it was at the time of the first conversation? [168]

A. Yes, sir.

Q. And what was that conversation?

A. I asked Mr. Steinberg if he had any personal possessions in the cabin. He said that he did. I asked him what possessions or possessions he had. He said that he had a wallet.

I asked him where the wallet was. He said it was in a dresser drawer in the cabin.

I brought Mr. Steinberg inside, and he pointed to a dresser drawer in the living room of the cabin and directed us to a wallet, a brown wallet, in that dresser drawer. We showed the wallet to Mr. Steinberg and he said that that was his wallet.

The Court: Mr. Schnacke, you have some more?

Mr. Schnacke: Yes, sir.

The Court: I think perhaps we might take the noon recess now. We will resume the trial, ladies and gentlemen, at 2:00 o'clock. Please return at that time.

(Whereupon the noon adjournment was taken to the hour of 2:00 o'clock p.m. this date.) [169]

JOSEPH P. McCANN

resumed the stand as a witness on behalf of the Government and having been previously duly sworn, testified further as follows:

Direct Examination—Resumed

Mr. Schnacke: Q: Mr. McCann, as I recall, prior to the noon recess, you had testified that you had a conversation with Mr. Steinberg about a wallet? A. Yes.

Q. And that you went with him into the house, and that he pointed out a wallet as his, is that correct? A. Yes, sir.

Q. Where did you say that wallet was located?

A. The wallet was located in a drawer in a dresser in the living room of the house on the first floor.

Q. I will show you a wallet which is now empty and ask you if you can identify that wallet?

A. This is the wallet in question.

Q. Are there any marks on that by which you can make that identification?

A. My initials are on this corner right here (indicating), and my recollection is that—there is a stamp "Mexico" on [170] the wallet, and I recall there was a stamp "Mexico" on this particular wallet.

Mr. Schnacke: May the wallet be marked for identification Government's exhibit next in order?

(Thereupon the wallet referred to above was marked Plaintiff's Exhibit No. 82 for identification.)

(Testimony of Joseph P. McCann.)

Mr. Schnacke: Q. I will show you a key and a number of documents and ask you if you have seen those before and, if so, when and where?

A. Those items were in the wallet which was found in the dresser drawer, and the key with it.

Q. And the key, also?

A. The key, yes, sir. The key was in the wallet.

Mr. Schnacke: I will ask that these documents and the key be received in evidence as Government's exhibit next in order.

Mr. Gladstein: If Your Honor please, my first point of objection is that the offer is too broad. It should be limited, in any event, if admissible, as against the particular defendant involved. The offer is simply that they may be received in evidence, so my first point is, if it is received at all, it can only be received concerning the defendant Steinberg.

My second objection is, however, even as to this defendant, [171] there is no proper foundation laid and it is incompetent, irrelevant and immaterial.

Mr. Schnacke: We will offer these as to the defendant Steinberg only at this time, and will make the appropriate motion with respect to them at a later time.

The Court: The exhibits will be admitted as against the defendant Steinberg.

(Thereupon key and documents referred to were received in evidence and marked Plaintiff's Exhibit 83, against defendant Steinberg only.)

The Court: Perhaps it might be well if I state

(Testimony of Joseph P. McCann.)

to the jury now that in connection with this witness' testimony we have previously admitted a conversation between the witness and the defendant Steinberg. And now some documents as against the defendant Steinberg have been admitted.

Now, the Court has admitted these documents and this testimony only as against the one defendant for the time being. Until such time, if at all, as the Court makes an order admitting this testimony as against all defendants, it is the duty of the jury to consider this evidence only as against the particular defendant against whom it has been admitted.

Mr. Schnacke: Q. Now, Mr. McCann, you have referred to a key as being found among the items that are included in [172] Government's Exhibit 83.

Did you have occasion to use that key on any of the items or containers or bags found around the Twain Harte cabin?

A. Yes, sir, I did.

Q. And did you find at that time that this key fitted the lock of any of those items?

A. Yes, sir, I did.

Q. What lock did it fit?

A. There was a brown suitcase which was in the upper bedroom of the house, I believe on the south side, with lock number 1120 on it. That key, which is also marked 1120, fits into that suitcase.

Q. And that bedroom is the bedroom that is over the kitchen-dinette area, is that right?

A. May I look at the diagram?

(Testimony of Joseph P. McCann.)

Q. Yes (handing exhibit to the witness).

A. Yes, I believe that is.

Q. Was that right, or was it in the other bedroom?

A. I believe it was in that bedroom, sir.

Mr. Schnacke: Your Honor please, I would like to identify these documents that have been admitted for the jury.

The key you have already heard referred to. There is another very small piece of paper that—well, it is quite short. I will read it.

"Wed—W-e-d—July 23," and the figures "20". "July 25" and the figure "20". "Wages July 27" and the figure "25".

There is something that is stricken that I can't read. Another line follows, apparently two words that are illegible, followed by a "2" and "25". Then, "John to R 30. Wages August 9-25. Rent August 9-9th."

It bears on the back the date and certain initials.

Another small scrap of paper says, "September 16-860". Under that "For car". Then initials.

State of California Citizens Angling license in the name of Josh Newberg. Description. Issued October 18, 1952.

Then there is a small caption, "Approved identification card. Name: Joshua Newberg, 1224 Windemere Avenue, Menlo Park, California." Telephone number. "Employed by: Music teacher". And a description below that and the agent's initials.

(Testimony of Joseph P. McCann.)

Then there are three cards, business card type. "Joshua Newberg, teacher of violin and mandolin, 1224 Windemere Avenue, Menlo Park. By appointment. Davenport 3-2604."

There is a Social Security card in the name of Joshua Newberg containing a signature after the word "Worker's signature". The signature appearing there reads "Joshua Newberg."

Then there are six documents, all appearing to be of the same character, that is to say, rent receipts received of [174] Joshua Newberg. The first, "$80 for rent, 1224 Windemere, 1st of August, ending September 1st, 1952" bearing signature that appears to be "Leona Swan." That is dated August 3, 1952.

The next of them is generally the same, covering the period September to October 1st, dated September 1st. Also $80. Signed "Leona Swan".

The next is dated October 1, 1952, covering October to November 1st, 1952, $80, signed "Leona Swan".

And "April 1, 1952, received of Joshua Newberg $80," same address, "April to May, 1952, Leona Swan.

"July 3rd, 1952, received of Joshua Newberg, $80". Same address. "July to August 1st, Leona Swan."

"May 25 to June 1." Same address. "May to June 1." Leona Swan's signature.

June 1, 1952, rent receipt, "Received of Joshua

(Testimony of Joseph P. McCann.)

Newberg $80 for 1224 Windemere, 1st June to 1st of July $80," signed "Leona Swan."

Mr. Schnacke: Q. Mr. McCann, in your search of the person of Mr. Steinberg and in the wallet of Mr. Steinberg did you find any material on him bearing the name "Sidney Steinberg"?

A. No, I did not.

Q. Or anything bearing the name "Sidney Stein"? A. No, I did not. [175]

Mr. Schnacke: No further questions, Mr. McCann.

Cross Examination

Mr. Gladstein: Q. Mr. McCann, did I understand you to say you had seen Mr. Steinberg six or seven times before August, 1953?

A. Yes, sir.

Q. I think you said you first knew him or knew of him about November 1950?

A. I believe so, sir.

Q. Was this a personal acquaintance?

A. No, sir.

Q. You merely observed him at some time, is that it? A. Yes, sir.

Q. Was he pointed out to you as being Sidney Steinberg?

A. I had seen pictures of him.

Q. I beg your pardon?

A. I had seen pictures of him and——

Q. Prior to that time?

A. Pardon me?

Q. Prior to November 1950?

(Testimony of Joseph P. McCann.)

A. Yes, sir.

Q. Where? In what city? What part of the United States did you see Sidney Steinberg for the first time?

A. I believe it was New York City. It was New York City. [176]

Q. I beg your pardon?

A. New York City.

Q. No question about that, is there?

A. No, sir.

Q. That was in November, is that right?

A. I believe so, sir.

Q. Do you remember where in New York City you saw him? Just the general location.

A. Well, in the vicinity of his residence and in the vicinity of Communist Party headquarters.

Q. What is the address of the latter and what is the address of the former?

A. The address of his residence at that time was 31-23 83rd Street, Jackson Heights, Queens. That is his residence.

Q. Yes. And the other?

A. Communist Party headquarters was 35 East 12th Street.

Q. What city? A. New York City.

Q. Were you keeping him under surveillance at that time?

A. No, sir. In that particular month?

Q. Yes, in that particular time?

A. No, sir, not that particular month, no.

(Testimony of Joseph P. McCann.)

Q. But you did put him under your observation, is that right? A. Yes, sir. [177]

Q. I take it that wasn't an idle act of curiosity on your part, but part of your orders or instructions, is that so? A. Yes, sir.

Q. For how long on that first occasion did you keep him under your observation?

A. As best I can recall, and I feel quite sure the date was in November 1950, I observed him leaving his house one particular morning and proceeding to Communist Party headquarters via subway.

Q. You followed him?

A. That is correct.

Q. How long altogether did you have him under your observation or surveillance or examination at that time?

A. I believe it was approximately an hour.

Q. Was there, to your knowledge, any lawful process outstanding for his arrest or anything of that kind at the time?

Mr. Schnacke: I object to that as being immaterial. No process is necessary for such activity on the part of the FBI.

Mr. Gladstein: I am not suggesting that there is a question of whether there has to be lawful process.

The Court: It may be a matter of circumstances that goes into the matter of observation.

Mr. Schnacke: I don't see how whether there was process outstanding or not would affect the

(Testimony of Joseph P. McCann.)

ability recognize the [178] man after he sees him on this last occasion.

The Court: I would be inclined to agree with you, but nevertheless counsel can inquire into the circumstances. I will overrule the objection.

The Witness: There was no process.

Mr. Gladstein: Q. When was the next time you saw him? A. In June of 1951.

Q. Could you give us, to the best of your recollection, if you have one, the time in June?

A. I believe it was during the week running from June the 12th, approximately, to June the 17th.

Q. Well, are we to understand you saw him once during that interval or a number of times?

A. A number of times.

Q. How many times during that interval?

A. Oh, I would say approximately four times.

Q. Four? And in what city or cities?

A. New York City.

Q. Were these similar surveillances to the one that you have described?

A. The times that I saw him in June, I observed him on all occasions briefly, that is, when he was in the vicinity of his residence, and then on another occasion, perhaps, in the vicinity of Communist Party headquarters. I did not follow him for any length of time. [179]

Q. But you did follow him from one place to the other? A. No, I did not, sir.

Q. I see.

(Testimony of Joseph P. McCann.)

A. I merely observed him in both places.

Q. I see. You were assigned to do that?

A. Yes, sir.

Q. And you say the last such date would be before the 17th of June, 1951?

A. Yes, before June 17th.

Q. And there was no process of any kind outstanding against him during that period, was there?

A. There was no process outstanding.

Q. When is the next time you saw him, and in what city, after June 17th, 1951?

A. At Twain Harte, California, on August 27, 1953.

Q. And that's the time that you have already told us about? A. Yes, sir.

Q. Mr. McCann, in your testimony this morning I understood you to say that at the time that you and the other agents left your place of observation at the house and went into the yard, that you found Mr. Steinberg there outside the house, is that so? A. Yes, sir.

Q. And observed him alone or with anyone else?

A. Mr. Thompson was standing nearby. [180]

Q. With him? Oh, nearby? A. Nearby.

Q. And were they the only two persons among the five who were taken into custody who were then outside the premises?

A. As best I can recall.

Q. Yes, sir. I understood you to say that you then had a conversation, a brief one, with Mr.

(Testimony of Joseph P. McCann.)

Steinberg in which you stated to him or asked him if he were Sidney Steinberg, and he said, "You know who I am," and so on, is that so?

A. Yes.

Q. And at that time you told him he was under arrest, is that so? A. Yes, sir.

Q. Were you the first officer that stated to him he was under arrest?

A. No, sir, I wasn't.

Q. Who was the first?

A. The special agent in charge advised the persons in the yard, namely, Thompson and Steinberg, prior to my telling Mr. Steinberg that.

Q. What did he say?

A. "You are under arrest. This is the FBI: You are under arrest."

Q. Then thereafter you, in your conversation with Mr. Steinberg, told him—you repeated the statement, in essence, [181] "You are under arrest"? A. Yes.

Q. And you told him what he was under arrest for, is that so? A. Yes.

Q. And you said, as I understand it, he was under arrest on a charge under the Smith Act?

A. Yes, sir.

Q. Now, was that the first statement to Mr. Steinberg made by you or anybody in your presence informing him of the ground or reason for his arrest?

A. I am not sure whether the announcement of the special agent in charge was prior to my or

(Testimony of Joseph P. McCann.)

subsequent to my statement, but he did also tell the defendants that they were under arrest,—that is, Steinberg and Thompson,—for violation of the Smith Act. I am not sure whether that was prior or subsequent to my advising him.

Q. You heard him say that either before or after you said the same thing?

A. That's right, yes, sir.

Q. I think you said that later on—withdraw that.

Immediately after that they were told to raise their hands, and so on, is that so?

A. Well, almost simultaneously.

Q. Yes. Guns were drawn by the agents of the Bureau? A. Yes, sir. [182]

Q. And I believe you said that they were directed to a tree or some trees nearby?

A. As far as Mr. Steinberg is concerned, we directed him to place his hands up against a tree.

Q. Up against a tree? Was he then handcuffed?

A. After we searched him, we then handcuffed him.

Q. Describe to us what the handcuffing consisted of?

A. Well, you reach out and grip his arm——

Q. No, just what did you do at that time, not what you would generally or usually do.

A. I don't understand the question.

Q. Did you handcuff him?

A. Yes, I handcuffed him, yes, sir.

(Testimony of Joseph P. McCann.)

Q. Did you put his arms around the tree and handcuff him? A. No, sir.

Q. Are you sure about that?

A. No, sir, I did not.

Q. Didn't you put his arms around the tree and handcuffed his hands, leaving him in a position where he had the tree between his body and his hands? A. I do not recall that, sir.

Q. Did you later come up to him and ask him if the handcuffs were too tight?

A. We did ask him if the handcuffs were too tight, yes, sir.

Q. And he said—what did he say? [183]

A. I recall that he said they were too tight.

Q. Is it true you then tightened them?

A. I loosened them.

Q. Are you positive of that?

A. I am positive of that, yes.

Q. How many times did you adjust the handcuffs?

A. As best I can recall, one time.

Q. Thereafter, I understood you to say that prior to taking Mr. Steinberg and the other defendants away from the premises, you or somebody in your presence asked him if there was anything he wanted to take with him and he made reference to a wallet, is that so? A. Yes, sir.

Q. And that you then took him into the house and this wallet that you have identified was the one he pointed out? A. Yes, sir.

(Testimony of Joseph P. McCann.)

Q. Your question to him was whether he wanted to take that with him, is that so? Before that?

A. My question outside was whether he had any thing in the cabin he wished to take with him.

Q. Yes. And your testimony is that he indicated that he had, and you took him in and he pointed out this wallet? A. That is right.

Q. Did you give him the wallet?

A. I showed him the wallet. [184]

Q. Did you give him the wallet?

A. I did not hand it to him.

Q. Did you give it to him?

A. I did not hand it to him.

Q. Did you give him any part of it?

A. No, sir.

Q. Did you give him anything in it?

A. No, sir.

Q. You didn't have intention of letting him have the wallet, did you?

Mr. Schnacke: I object to that as being immaterial.

The Court: Well, it is argumentative. Sustained on that ground.

Mr. Gladstein: Q. Did you take the wallet with you and then did you turn it over to somebody else? A. I examined the wallet.

Q. My question was, did you turn it over to somebody else—did you take it with you?

A. Yes, sir.

Q. You did? A. Yes, sir.

Q. With you personally? A. Yes, sir.

(Testimony of Joseph P. McCann.)

Q. And took it back to San Francisco?

A. Yes, sir. [185]

Q. On the ride to San Francisco who were the occupants of the car in which you rode?

A. Special Agent James Carlisle drove the car. I rode in the back seat with Mr. Steinberg.

Q. Those are the three people? No others were in the car? A. That is right, sir.

Q. Did you ask Mr. Steinberg during that ride if he cared to hear about his family?

A. Yes, sir.

Q. You knew he had a family, did you?

A. Yes, sir.

Q. What does his family consist of?

A. He has a wife, Sophie Steinberg and two boys.

Q. And their ages?

A. Oh, I believe they are approximately 17 and 13.

Q. What did you do with the wallet and the contents after you returned to San Francisco?

A. I still had it with me when I returned to the office, and Mr. Steinberg and I and the other agent went into an interview room, and I again looked at the contents of the wallet.

Q. Yes? And did what?

A. I then initialed the contents of the wallet and turned it over to one of the other agents to be detained in our files.

Q. Did you initial each item contained in the wallet? [186] A. Yes, sir.

(Testimony of Joseph P. McCann.)

Q. What initials did you place on the wallet?

A. JPMc.

Q. Were your initials stamped on each document you have identified here?

A. Yes. I had a little trouble with the key. It was difficult.

Q. Was the key inside the wallet?

A. Yes.

Q. Aside from the key, you had no trouble writing your initials? A. No, sir.

Q. All right. What did you do then with the wallet and its contents?

A. I turned it over to one of the agents who put it in our files for safe keeping.

Q. That is the last you saw of it until today?

A. No, I have seen the wallet previously to today.

Q. Previously to today and since the time of the arrest? A. That is right.

Q. On how many occasions?

A. I believe on one occasion.

Q. Then was when, please?

A. In the United States Attorney's office.

Q. When? [187]

A. Oh, I believe it was yesterday.

Q. Did you appear before the Grand Jury?

Mr. Schnacke: I will object to that as being immaterial.

The Witness: Excuse me, sir?

Mr. Gladstein: There is an objection before the Court. Just a moment.

(Testimony of Joseph P. McCann.)

Mr. Schnacke: I don't see how his appearance before the Grand Jury——

The Court: What Grand Jury are you talking about?

Mr. Gladstein: The Grand Jury in this case, in regard to the wallet and its contents, if Your Honor please.

The Court: Well, that is—. I never heard of that being asked before.

Mr. Gladstein: I think it is permissible, Your Honor.

Mr. Schnacke: In any event, the proceedings before the Grand Jury are secret.

Mr. Gladstein: I didn't ask him what he said before the Grand Jury. I asked if he was there.

Mr. Schnacke: It isn't proper——

Mr. Gladstein: (interposing) There is no secret who is before the Grand Jury. The newspapers get it.

The Court: They are not supposed to know, but they get it anyhow.

Mr. Gladstein: I will ask for a ruling on the question, if Your Honor please. [188]

The Court: I will sustain the objection. I can't personally see the materiality of that.

Mr. Gladstein: Very well.

Mr. Gladstein: Q. Did you lodge a charge or sign a warrant or complaint against Mr. Steinberg?

Mr. Schnacke: I object to that, being outside the scope of the direct examination.

(Testimony of Joseph P. McCann.)

The Court: Read that, please.

(Question read by the Reporter.)

The Court: Sustained. Unless there is some question of credibility or personal feeling of some kind. It doesn't make any difference, anyhow. Let him answer it. Overruled.

The Witness: Yes, I did, sir.

Mr. Gladstein: Q. When and where?

A. On August 28th, 1953.

Q. Where?

A. At the United States Attorney's office.

Q. What charge did you levy against him?

A. I believe it was a harboring charge. We signed a complaint. I signed a complaint, as I recall, accusing Mr. Steinberg of being involved in the harboring of Mr. Thompson.

Q. You didn't charge him with violation of the Smith Act? A. No, sir.

Q. You didn't charge him with being a fugitive from the Smith Act? [189] A. No, sir.

The Court: Well, he couldn't do that anyhow. He wouldn't have any power or authority to do that, so don't waste time on that.

Mr. Gladstein: Q. Did you serve a warrant of arrest on Mr. Steinberg at any time?

A. No, sir.

Q. Did you have a warrant of arrest to serve on him? A. At one time I did, sir.

Q. When? A. On June 20, 1951.

Q. Did you have one on August 27, 1953?

A. No, sir, not in my possession.

(Testimony of Joseph P. McCann.)

Mr. Gladstein: Just a moment, Your Honor. Just one other question:

Mr. Gladstein: Q. I take it it is correct that you didn't actually ever serve a warrant of arrest on him? A. No, sir.

Q. When you say "No, sir," you mean that is correct? A. That is correct.

Mr. Gladstein: Thank you. That is all.

Mr. Schnacke: Just a moment, Mr. McCann. One or two more questions. [190]

Redirect Examination

Mr. Schnacke: Q. Are you assigned to some special squad or duty by the Federal Bureau of Investigation? A. Yes, sir, I am.

Q. And what is that squad?

A. In New York City?

Q. Well, are you on a particular detail or type of work?

Mr. Gladstein: Oh, I am going to object to that as incompetent, irrelevant and immaterial, if Your Honor please, and not proper redirect examination.

Mr. Schnacke: Well, the question has come up as to questioning the occasions on which he observed Mr. Steinberg. I wish to develop the circumstances under which that observation or observations were made.

Mr. Gladstein: But I object to the question about the nature of the detail. I suggest that it invites testimony that may be improper, harmful, and prejudicial error.

(Testimony of Joseph P. McCann.)

The Court: Well, at the time——

Mr. Schnacke: I will withdraw the question.

The Court: You can ask him at the time.

Mr. Schnacke: Yes, Your Honor. I will withdraw the question.

Mr. Schnacke: Q. Mr. McCann, you say you did have a warrant in your possession for the arrest of Mr. Steinberg on June 20, 1951?

A. Yes, sir. [191]

Q. Did you attempt to serve that warrant?

Mr. Gladstein: I am going to object to that as incompetent, irrelevant and immaterial and not proper redirect examination.

Mr. Schnacke: It is a subject that you brought up, Mr. Gladstein.

Mr. Gladstein: No, I asked him if he had a warrant.

The Court: I will overrule the objection.

The Witness: Will you read the question, please?

Mr. Schnacke: Q. Did you try to serve that warrant? A. Yes, sir.

Q. What did you do in your efforts to serve that warrant?

Mr. Gladstein: I will object to that as hearsay and improper redirect examination and not within the scope of the proper redirect examination.

The Court: Well, in a very technical sense it is probably not redirect. It is in the general scope of issues. I think the question itself is a little too broad, counsel. You can ask him whether he tried to serve it and whether he did serve it or not. I

(Testimony of Joseph P. McCann.)

think that would be as far as it would be proper to go.

Mr. Schnacke: Q. Did you try to serve that warrant?

A. Over what period of time did you try to serve that warrant?

Mr. Gladstein: May I have the same objection, if the Court please? [192]

The Court: For that limited extent I will allow it.

The Witness: A. I first attempted to serve it on June 20th, 1951, at Mr. Steinberg's residence, and he had not been seen since that time.

Mr. Gladstein: I will object to that last portion, if Your Honor please. He may state whether or not he served it on that occasion. To say whether he has or has not been seen is purely an opinion and conclusion of the witness.

The Court: That is a conclusion.

Mr. Gladstein: That is my point.

The Court: The witness may state what he saw.

Mr. Gladstein: Yes. I am not objecting to that.

Mr. Schnecke: Q. He was not seen by you after June 20th, 1951 until the time you saw him at the cabin at Twain Harte? A. Yes, sir.

The Court: Q. You were not able to serve the warrant after that time? A. No, sir.

Mr. Schnacke: That is all.

Recross Examination

Mr. Gladstein: Q. You tried to serve him on June 20th, 1951? A. Yes.

(Testimony of Joseph P. McCann.)

Q. In New York City? [193] A. Yes.

Q. Is that the last date you sought to effect service of the warrant on him?

A. That is the last day I went to his residence, yes, sir.

Q. You had the warrant with you at that time?

A. Yes, sir.

Q. Did you keep the warrant?

A. In my physical possession?

Q. Or under your control.

A. Yes, it was in the New York office, yes.

Q. Until when?

A. Until Mr. Steinberg was arrested out here, and then I believe the New York office sent it out here.

Q. You did not bring it with you?

A. No, sir.

Q. When did you come to California and San Francisco in connection with this arrest?

A. I arrived in San Francisco on August 25th, I believe.

Q. And it was in connection with this matter, was it?

Mr. Schnacke: I will object to that as being immaterial and beyond the scope of the redirect.

The Court: Sustained.

Mr. Gladstein: Q. Did you or didn't you bring with you the warrant for Mr. Steinberg's arrest?

A. No, sir. [194]

Mr. Gladstein: Will Your Honor indulge me if I frame one more question in that connection?

(Testimony of Joseph P. McCann.)

Mr. Gladstein: Q. Is it or not true that your coming to California on or about the 25th of August 1953 had to do with the matter of arresting Sidney Steinberg?

Mr. Schnacke: I object to that as being immaterial and beyond the scope of the redirect examination.

The Court: What difference does it make anyhow? It is obvious he must have come out here for something in connection with it.

Mr. Gladstein: Yes, that is right, but I would like to have him state if that is the fact.

The Court: I guess they were trying to find him. That is what the witness indicates. What difference does it make what day he came?

Mr. Gladstein: Does Your Honor wish to have me answer that?

The Court: No, perhaps I should not have said it. I do not see any point in prolonging the examination. It is not material to the direct examination.

Mr. Gladstein: According to my theory of the defense it is material and I will simply take a ruling.

(The question was read.)

The Court: Sustained.

Mr. Gladstein: That is all. [195]

Mr. Schnacke: One more question.

Further Redirect Examination

Mr. Schnacke: Q. The warrant that you at-

(Testimony of Joseph P. McCann.)

tempted to serve on June 20th, 1951, do you know from what Court or authority that was issued?

Mr. Gladstein: I object to that because it is not the best evidence. It calls for the opinion and conclusion of the witness.

The Court: The trouble is you opened this subject about the warrant yourself. Of course it is not the best evidence. There is no doubt about it. It is a waste of time. When you have matters of record you should not be asking people to tell you what they think about papers.

Mr. Gladstein: If Your Honor will indulge me, and I think the record will support me, this is how the matter came up: I asked the witness if he had a warrant for the arrest of Mr. Steinberg on the 27th and he said no, but he had one previously from New York. In other words, it was a volunteer statement on his part.

The Court: No, you asked him whether at the time he went to see him he had a warrant and whether he kept it with him, and he said no, he had it in the office. You developed that line of examination, too.

Mr. Gladstein: That came without—— [196]

The Court: Let us pass over it and get on to something else.

Mr. Gladstein: I simply made an objection.

Mr. Schnacke: Was the objection sustained, Your Honor?

The Court: That was your objection.

Mr. Schnacke: No, my last question was for the

(Testimony of Joseph P. McCann.)

authority issuing the warrant that he had in his possession in New York.

The Court: Well, you know what it is, counsel.

Mr. Schnacke: The point is there has been a discrepancy by one day I would like to clarify.

The Court: Overruled.

The Witness: A. The warrant that I served——

Mr. Schnacke: (Interposing) That you attempted to serve on June 20th, 1951, in New York.

The Witness: That was a commissioner's warrant issued from the office of the United States Commissioner.

Mr. Schnacke: Thank you.

The Witness: The Southern District of New York.

Mr. Schnacke: No further questions.

The Court: Anything else? That is all.

(Witness excused.)

JAMES F. EAGAN

called as a witness on behalf of the Government, and having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [197]

The Clerk: Q. Please state your name to the Court and to the jury. A. James F. Eagan.

Direct Examination

Mr. Schnacke: Q. Mr. Eagan, what is your occupation?

A. Deputy United States Marshal.

(Testimony of James F. Eagan.)

Q. In the course of your employment as Deputy United States Marshal have you ever met or seen the defendant Sidney Steinberg?

A. I have.

Q. Will you describe the circumstances under which you saw him and the approximate date, if you recall?

A. Well, I don't remember the exact date but it was at the time they were in custody in our office.

Q. At the time Mr. Steinberg was in your office did you have occasion to take his fingerprints?

A. I did.

Q. I will ask you to look at that document and identify it if you will, please?

A. I am sorry, I didn't hear you.

Q. I said will you identify that document if you can.

A. That is the fingerprints I took of Sidney Steinberg on August 31st, 1953.

Q. And that is a business record of the office of United States Marshal, is it? [198]

A. That is right.

Mr. Schnacke: I will ask that that document be received in evidence.

The Court: Admitted as to the defendant Steinberg.

(The document referred to was thereupon received in evidence and marked Government's Exhibit No. 84.)

Mr. Schnacke: No further questions.

Mr. Gladstein: No questions, Your Honor.

(Testimony of James F. Eagan.)

Your Honor stands that this last exhibit, similar to the previous one, is subject to a general objection that they have no probative value unless there is some further purpose.

The Court: Overruled.

(Witness excused.)

WILLIAM L. HANNAN

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. William L. Hannan.

Direct Examination

Mr. Schnacke: Q. Mr. Hannan, what is your occupation? [199]

A. Deputy U. S. Marshal.

Q. Assigned to what office?

A. The Marshal's office, Criminal Department.

Q. In San Francisco? A. Yes.

Q. In connection with your duties on about September 9th, 1953, did you see any of the defendants in this case? A. Yes, sir, I did.

Q. Which of the defendants did you see?

A. I saw all three of them.

Q. Which three? I will withdraw that. Among the three did you see the defendant Patricia Blau? A. Yes.

(Testimony of William L. Hannan.)

Q. Who is sitting at the end of the table?

A. Yes.

Q. On that occasion did you have occasion to take her fingerprints? A. Yes.

Q. I will show you a document and ask you if that document represents the fingerprints that you took of Patricia Blau on that occasion?

A. Yes.

Q. On that occasion did you ask the defendant her name? A. Yes.

Q. What name did she give you? [200]

A. Janet Marie Conroy.

Mr. Schnacke: I will ask that the document identified by the witness be received in evidence as Government's next in order.

Mr. Gladstein: Same objection and the same request for limitation, if the Court please.

The Court: Same ruling. Admitted.

(The document referred to above was thereupon received in evidence and marked Government's Exhibit No. 85.)

Mr. Schnacke: No further questions.

Cross Examination

Mr. Gladstein: Q. Is this your writing on this document at the top? A. Yes.

Q. I see you have written there Janet Marie Conroy? A. Yes.

Q. You have also written "alias Patricia Blau?"

A. Yes.

(Testimony of William L. Hannan.)

Q. You asked her if that had been her name at one time?

A. Well, she was under that—yes.

Q. She said that had been her name?

A. Yes.

Mr. Gladstein: That is all. [201]

Mr. Schnacke: If Your Honor please, may the order excluding witnesses be held not to apply to members of the United States Marshal's office whose duties will call them in and out of the courtroom?

The Court: All right.

(Witness excused.)

GLENN A. HARTER

called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and jury.

A. Glenn A. Harter.

Direct Examination

Mr. Schnacke: Q. Mr. Harter, what is your occupation?

A. I am a special agent with the F.B.I.

Q. For how long have you been so employed?

A. 11 years.

Q. To what office are you assigned?

A. San Francisco.

(Testimony of Glenn A. Harter.)

Q. On August 27th of last year were you one of the agents at the Twain Harte cabin?

A. Yes, sir. [202]

Q. Did you participate in the arrest of any of these defendants? A. Yes, I was present.

Q. You were present at the time they were arrested. What time did you first arrive at the cabin, Mr. Harter?

A. About five minutes after 1:00.

Q. After you arrived can you tell us in general what you did in connection with these defendants? What was your assignment at the cabin, in other words?

Mr. Gladstein: I am going to object to what his assignment was.

Mr. Schnacke: Q. Pursuant to your assignment what did you do at the cabin?

A. I stood outside with the other agents and the defendants, and then I went into the cabin and stood there. At the same time the matron was with the female defendant and then I went back outside——

Q. There are two female defendants. Which of them are you referring to?

A. Mrs. Kremen. When I got outside I looked in her handbag and her overnight case that she brought with her in the company of the matron.

Q. Where was that, Mr. Harter?

A. Just outside the cabin door.

Q. In the area outside the cabin? [203]

A. Yes.

(Testimony of Glenn A. Harter.)

Q. Approximately what time of day was that, do you recall? How long after the arrest was made did that occur?

A. I don't recall exactly. I would say maybe 20 minutes, 30 minutes.

Q. Did I understand you to say that Mrs. Kremen had been in the cabin and had changed her clothes and was coming out of the cabin at this time? A. That is correct.

Mr. Gladstein: I didn't get all of that. Maybe he did but I didn't hear it. I object to leading questions.

The Court: Perhaps it was, but the witness already answered it.

Mr. Schnacke: Q. Did you have a conversation with Mrs. Kremen on that occasion?

A. No, sir, I didn't converse with her at that time.

Q. Did you say anything to her?

A. No, sir.

Q. And she said nothing to you? A. No.

Q. You say she did have with her her purse, is that right? A. That is correct.

Q. Did you take that purse from her?

A. No, she set it down on the ground there, and I then examined it. [204]

Q. What did you do with respect to the contents of that purse?

A. I put my initials and the date on each piece of paper that was in her purse that I thought would be pertinent.

(Testimony of Glenn A. Harter.)

Q. Then what did you do with her purse?

A. Then I turned it over to Mr. Erickson.

Q. I will show you certain documents and ask you if you have ever seen those before, and if so when and where?

A. Yes, these are the documents that were in the purse of Mrs. Kremen.

Mr. Schnacke: I will ask that those documents as a group be received in evidence as Government's Exhibit next in order, and we will offer them at this time solely against the defendant Shirley Kremen.

Mr. Gladstein: I make the objection that there was no warrant of arrest or search warrant at the time and under the circumstances no proper foundation has been laid for the reception of these documents in evidence, and I move to suppress them, the same motion I made about previous documents.

The Court: I have already ruled on the objection, so the motion will be overruled.

(The documents referred to were thereupon received in evidence and marked Government's Exhibit No. 86 as to the defendant Kremen.)

Mr. Schnacke: May I identify these to the jury, if Your [205] Honor please? There is a library card, the San Jose Public Library, in the name Lee Kaplan, Mrs. R. K. in parenthesis, 1244 Lick Avenue, expires September 16th, 1955.

Another library card, San Jose Public Library, expires June 18th, 1955, Richard Kaplan, 1244 Lick Avenue.

A State of California resident citizen's angling

(Testimony of Glenn A. Harter.)

license in the name of Lee Kaplan, 1244 Lick Avenue, San Jose.

United States Forest Service, free campfire permit issued to Mrs. Lee Kaplan, 1244 Lick Avenue, San Jose, date of issue July 13th, 1953. The signature of the issuing officer is shown as James Morrow, Agent, issued at Twain Harte, and an automobile as described. The make, Plymouth; license number 1A38276, the State, California.

Social Security card in the name of Lee Kaplan, an identification card, automobile insurance, bearing the rubber stamp GARVIS, insurance agent, Oakland, California. The typewritten name, Richard Kaplan, San Jose, California. Policy number, and it expires September 18th, 1953.

California Motor Vehicle Operator's License in the name of Lee Lefko Kaplan, 1244 Lick Avenue, San Jose, California.

Pacific Gas & Electric Company bill issued to R. Kaplan, 1244 Lick Avenue; San Jose Water Works bill, bearing on the reverse the name Richard R. Kaplan, 1244 Lick Avenue, San Jose.

And a document saying that this is your invoice to Mrs.—I [206] beg your pardon—to Mr. Richard Kaplan, 1244 Lick Avenue, San Jose.

Under make and model it reads, Ply. '47. The license number and State, 1A38276 California. Remove & replace radiator 3.50. Check car for—and I can't read the last word—it looks like it begins with "sh"—and has two other letters—2.50. The

(Testimony of Glenn A. Harter.)

charge for one radiator $41.00. Total bill, $48.44, marked paid in full.

Mr. Schnacke: Q. Mr. Harter, did the defendant Shirley Kremen have anything on her person or possession when seen by you containing the name Shirley Kremen?

A. The material I examined did not reflect any such name.

Q. Or anything reflecting the name Mrs. Irving Kremen?

A. Only the names that you just read there. That was the material I observed.

Q. What time did you leave the area around the cabin, Mr. Harter?

A. Do you mean to come to San Francisco?

Q. Finally leave it.

A. We came back to San Francisco and left about 2:30 or 2:40 p.m.

Q. Did you leave by automobile?

A. Yes, sir.

Q. Were you driving that car?

A. No, sir. [207]

Q. Who was driving it?

A. Agent Galligan.

Q. Who was in the car with you?

A. The defendant Ross or Rasi.

Q. Is that all, you, Agent *Gallagher,* and the defendant Carl Ross? A. That is right.

Q. What type of car is that? A 4-door sedan?

A. 4-door sedan.

Q. Where were you sitting?

(Testimony of Glenn A. Harter.)

A. I was sitting in the right rear.

Q. Where was Mr. Ross sitting?

A. In the left rear.

Q. That would leave Special Agent *Gallagher* in the front by himself? A. That is correct.

Q. You say you left the cabin about what time?

A. About 2:30 or 2:40.

Q. You drove where?

A. We came to San Francisco directly from the cabin.

Q. During the course of that ride did you have any conversation with the defendant Steinberg?

A. Yes, sir.

The Court: You have the wrong one.

Mr. Schnacke: With the defendant Ross. I beg your pardon. [208]

Mr. Schnacke: Q. What was the nature of that conversation? What did you say and what did he say?

A. Well, we didn't say very much. We mentioned fishing. I asked him if he enjoyed the fishing and if the fishing had been very good, and he stated no, the fishing was quite poor there. The fish are all quite small. The motor of the car was making quite a bit of noise.

Mr. Gladstein: I didn't hear the last at all. I am sorry.

The Court: He said, "The motor of the car was making quite a bit of noise."

The Witness: It made a lot of squeaky noises like a violin, and I said to Ross, "Does that remind

(Testimony of Glenn A. Harter.)

you of Steinberg's violin playing?" And he stated, "Oh no, he plays much better than that."

The rest of the conversation was maybe about the trees or the road.

Mr. Schnacke: I think I mispronounced the name of the agent who drove the car. I believe I said Gallagher. His name is Galligan?

The Witness: Galligan, that is correct.

Mr. Schnacke: Thank you, Mr. Harter.

The Court: Proceed. [209]

Cross-Examination

Mr. Gladstein: Q. You say, sir, that you took these documents from a purse? A. Yes, sir.

Q. Describe that purse for me.

A. I don't recall the description of the purse.

Q. Can you tell us anything at all about it?

A. No, sir, other than it was in a purse.

Q. Was it a wallet rather than a purse?

A. There was enclosed in the purse a small wallet.

Q. Where were the documents that you have identified? In the purse or in the wallet?

A. The small wallet was in the purse. All the documents were in the purse.

Q. My question was where were the documents, in the purse or in the wallet?

The Court: He said all the documents were in the purse.

Mr. Gladstein: Q. Were they outside of the wallet? A. I don't recall.

(Testimony of Glenn A. Harter.)

Q. Was the wallet empty?

A. The wallet was not empty.

Q. Did the wallet contain the documents that you identified?

A. It may have contained some of them.

Q. As a matter of fact, that wallet you took from inside the premises together with its contents, didn't you? [210]

A. Inside the premises I handed the wallet to Mrs. Kremen.

Q. And it was not in any purse at that time, was it?

A. I don't understand your question.

Q. I say the wallet was not in any purse at the time you handed the wallet to Mrs. Kremen, was it?

A. No,

Q. Where was the purse at that time?

A. I couldn't tell you.

Q. Where did you find the purse before you handed it to Mrs. Kremen?

A. I didn't hand the purse to Mrs. Kremen.

Q. Excuse me, the wallet. Where did you find the wallet before you handed it to her?

A. It was in an open drawer at the foot of the stairs.

Q. Did you yourself take it from the drawer?

A. Yes.

Q. Where was Mrs. Kremen at that time?

A. On the stairs.

Q. Going up, coming down or standing there?

A. Going up.

(Testimony of Glenn A. Harter.)

Q. Was she accompanied by anyone?

A. The matron.

Q. Did you then go upstairs and remain up there for a time? A. Yes, sir.

Q. Do you know whether it was on that occasion that the [211] matron subjected Mrs. Kremen to a personal search?

A. I was downstairs at the foot of the stairs. I wouldn't know.

Q. After some time did they both some downstairs? A. That is correct.

Q. Approximately how long were they away?

A. Well, I couldn't answer specifically. I imagine five minutes.

Q. It was while she was on the stairs going up with the matron that you took hold of the wallet, isn't that so? A. That is correct.

Q. When she came downstairs with the matron where did she then go? A. Outside.

Q. With the matron accompanying her?

A. That is correct.

Q. Did she have a purse with her at that time?

A. A purse and the overnight bag.

Q. After the matron and Mrs. Kremen got outside did you come out with the wallet?

A. No, sir.

Q. Who brought the wallet out?

A. Mrs. Kremen.

Q. When did she obtain it?

A. I gave it to her when she went upstairs. [212]

(Testimony of Glenn A. Harter.)

Q. Did you have a conversation with her before she went upstairs? A. No, sir.

Q. But nevertheless as she went upstairs you handed her a wallet? A. Yes, sir.

Q. Before you or she ever had any words with each other?

A. I had the wallet and I handed it to her. I said, "Is this yours?" There was no conversation whatsoever. She took it and kept on walking.

Q. And went upstairs with it?

A. Yes, I imagine she did.

Q. Did you observe that she went upstairs?

A. She went upstairs and she had it in her hand, yes.

Q. And she came back with it in her hand?

A. I didn't see it when she came back.

Q. But when she came back you saw her with a purse?

A. When she came back she had her purse and her overnight bag.

Q. And then she went outside?

A. That is right.

Q. And then you went outside?

A. That is correct.

Q. And then you say she put the purse down?

A. And the bag. [213]

Q. And the handbag. Then did you look through the contents of both of those? A. Yes.

Q. And it was in the purse that you found the wallet? A. Yes.

Q. The wallet that you had handed to her?

(Testimony of Glenn A. Harter.)

A. Yes.

Q. And it is the purse from which these documents were taken that you identified?

A. That is correct.

Q. What did you find in the suitcase or overnight case? A. Just clothing.

Q. At the time that you handed the wallet to her were there other agents of the Bureau in the immediate part of the premises?

A. Yes, sir.

Q. Did they have their guns drawn, any of them? A. No, sir.

Q. Did you? A. No, sir.

Q. You had previously had, hadn't you?

A. Yes, sir.

Q. Was Mrs. Kremen handcuffed at that time?

A. No.

Q. Was she at any time?

A. I didn't observe her handcuffed at any time.

Q. The others taken into custody were at the time you handed the wallet to Mrs. Kremen in handcuffs?

A. I was in the house. I didn't have observation of the other defendants at that time.

Q. But you saw that they were handcuffed, didn't you? A. While I was in the house?

Q. Yes. The door was open, wasn't it?

Q. You can't see out of the house where I was standing.

Q. Was the door open?

A. I imagine the door was.

(Testimony of Glenn A. Harter.)

Q. Coming back to San Francisco you were riding with Mr. Ross? A. That is correct.

Q. And you were sort of joking there talking about fishing, is that right?

A. We were talking.

Q. I mean you raised the subject?

A. Yes.

Q. In a joking sort of way. A. No, sir.

Q. Did you say anything to him about his family? A. Yes, sir.

Q. What did you say?

A. I asked him if he had a family.

Q. Did he answer?

A. He answered that he did. [215]

Q. Do you know that he did?

A. Pardon?

Q. Do you know that he did?

A. He told me that he did. That is my only knowledge of it.

Q. Did he tell you what his family consisted of?

A. A wife and a child.

Mr. Gladstein: That is all.

The Court: Anything else?

Mr. Schnacke: That is all, thank you.

(Witness excused.)

The Court: We will take the mid-afternoon recess.

(Recess.) [216]

Mr. Schnacke: Clarence Dunker.

CLARENCE W. DUNKER

was called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the Jury?

A. Clarence W. Dunker.

Q. Please spell your last name?

A. D-u-n-k-e-r.

Direct Examination

Mr. Schnacke: Q. Mr. Dunker, what is your occupation?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. And for how long have you been so employed? A. Nineteen years.

Q. And where are you presently assigned?

A. I am assigned at Modesto, California.

Q. And where were you assigned on August 27, 1953? A. At Modesto, California.

Q. Is Modesto an office under the jurisdiction of the San Francisco office of the Federal Bureau of Investigation?

A. It is a resident agency of the San Francisco office. [217]

Q. On August 27, 1953, were you in the vicinity of a cabin at Twain Harte, California?

A. Yes, sir.

Q. And at what time did you arrive at the cabin on that day?

(Testimony of Clarence W. Dunker.)

A. A few minutes after 1 p.m.

Q. And were you present when the defendants Steinberg, Kremen, Ross and Coleman were arrested at that cabin? A. I was.

Q. What did you do in connection with those arrests?

A. Well, I drove down on the road which is just at the right of the cabin, and I remained there a few minutes while the other boys went to the cabin from other directions, and after a few minutes I walked up to the cabin, and then after I was up there for a short time I went into the house and on instructions, assisted in the search.

Q. And what part of the house did you search?

A. The living room.

Q. And referring to the living room, it is the area on the second page of the set of diagrams at the top portion of the house, is that correct?

A. Yes.

Q. Can you tell us in general how you proceeded with your search of the living room?

A. The first thing I did was to draw a sketch and locate the various pieces of furniture in the room. Then I numbered [218] each one of those pieces with a number, and then I described what that piece of furniture was.

I started with the chair that is near the entrance, and I started my search there, then proceeded around the room.

Q. In a clockwise or counter-clockwise direction?

A. That would be counter-clockwise.

(Testimony of Clarence W. Dunker.)

Q. You say you made a diagram at the time of the search? A. Yes, I did.

Q. Do you have that diagram with you now?

A. Yes, I do.

Q. Would you refer to that diagram—did you refer to that diagram prior to the time you took the witness stand?

A. Oh, yes, I have checked it over.

Q. So your testimony as you are now reciting it to us will be to some extent refreshed by the diagram you drew at the time of your search, is that correct? A. That is right, yes.

Q. (Handing document to the witness) I will show you a group of documents and ask you if you have ever seen those documents before, and, if so, when and where?

Mr. Leonard: Excuse me, Your Honor. If the witness is testifying, as he has indicated, from a written memorandum may we have that memorandum marked for identification so reference can be made to it later on?

The Court: Very well. [219]

Mr. Schnacke: No objection.

The Court: Mark it number 87 for identification.

(Thereupon diagram of agent referred to was marked Plaintiff's Exhibit No. 87 for identification.)

The Court: The question was whether you had seen these papers before.

The Witness: Yes. This was in the three-drawer desk which is shown on this diagram, and from the

(Testimony of Clarence W. Dunker.)

left-hand drawer there was an envelope with return address of Nathan J. Citron, 93 East San Antonio, San Jose. And this envelope contained an insurance policy of the Indiana Lumbermen's Mutual Insurance Company. And that is this thing here, and I initialed it. And travel checks of San Jose Ford Sales addressed to Janet Conroy, 69 North 10th Street, San Jose, postmarked 9/12/53. And a Shell lubrication road form.

Mr. Schnacke: Q. Well, it isn't necessary nor, I think proper for you to recite——

A. (Interposing) All right, yes, I have seen it.

Q. All I asked was whether you had seen those documents, or this document, before. A. Yes.

Q. You said that you had, and that you saw that document and took that document from a desk in the living room? A. Yes, sir. [220]

Q. Is that correct? A. That is correct.

Mr. Schnacke: I will offer this document in evidence at this time solely against the defendant Janet Conroy, Government's exhibit next.

Mr. Leonard: Objected to, if Your Honor please, on the ground it appears to be the results of an illegal search for which no process was issued, and there is no foundation laid in connection with any of the defendants. As counsel of record pointed out, the witness' volunteer answer—(portion of statement inaudible to the reporter)—should be stricken. The document speaks for itself. It cannot lay its own foundation.

Mr. Gladstein: May I add, I understood Mr.

(Testimony of Clarence W. Dunker.)

Schnacke to say he is offering that as against the defendant Janet Conroy?

Mr. Schnacke: As against the defendant Janet Blau. I beg your pardon.

Mr. Gladstein: I think under the circumstances no proper foundation has been laid.

The Court: May I see it? Admitted as against the defendant Blau.

(Thereupon insurance policy referred to above was received in evidence and marked Plaintiff's Exhibit No. 88, admitted as against Defendant Blau.) [221]

Mr. Schnacke: Q. I show you what appears to be a belt and ask you if you have ever seen it before? A. I have.

Q. Where did you see that?

A. I saw that on the straight chair which is in the corner of the room between the radio and the davenport.

Q. And how was that belt situated when you saw it?

A. It was around a pair of trousers.

Q. What type of trousers?

A. They were tan cotton trousers.

Mr. Schnacke: I will ask that the belt be marked for identification Government's exhibit next in order.

(The belt referred to was thereupon marked Plaintiff's Exhibit No. 89 for identification.)

Mr. Schnacke: Q. Now, I will show you Defendant's Exhibit A-12, and ask you if that reflects

(Testimony of Clarence W. Dunker.)

or shows the pair of pants and the belt to which you have just referred?

A. That is the belt and the pair of pants.

Q. And in this photograph I see money protruding from the belt. Was the money in the belt when you saw it?

A. Yes, there was money in the belt. It had two—. Do you want me to testify further?

Q. Yes. How much money was there?

A. In the belt to the trousers were two zipper money pockets containing $400 and $50— [222]

Mr. Gladstein: Just a moment. I didn't know the witness was going to read from the document, which is for identification. May I have a continuing objection to this kind of testimony, which is the equivalent of the offer of the exhibits or physical matters, money or whatever it is, for the same reasons we have heretofore advanced?

Mr. Schnacke: I offered it just for identification. He is talking about a belt reflected in the picture you offered into evidence.

Mr. Gladstein: That may be so, but my point is this: the witness is now giving oral testimony to the contents of something, I take it, rather than offering it physically.

The Court: He didn't offer the belt.

Mr. Gladstein: This is something in addition to the belt. He is talking about the contents of the belt, if Your Honor please. The belt is only marked for identification.

(Testimony of Clarence W. Dunker.)

Mr. Schnacke: The photograph of the belt and the photograph of the money——

The Court: He has identified it. He is testifying to something else that relates to the article he identified. I don't get the point.

Mr. Gladstein: I want to object to matters taken, and his enumeration of those matters in this form rather than by offering the matters themselves.

The Court: Oh. Very well. I will overrule the [223] objection.

Mr. Schnacke: Q. Now, then, I will show you a wallet with certain documents inside it and ask you if you saw that wallet and those contents in the course of your search of the living room?

A. I did.

Q. And where did you find those items?

A. This was on the straight chair between the davenport and the radio.

Q. And what was its position on the chair?

A. Well, this was in the trousers, in the back pocket of the trousers which were on the chair.

Q. Are those the trousers that were in the photograph——

A. Those are the trousers that were in the photograph.

Q. ——that you previously looked at?

A. Yes.

Q. And would you examine the documents and tell me where you saw those documents before?

A. Those documents were in the billfold?

Q. All of the documents that are there?

(Testimony of Clarence W. Dunker.)

A. All of the documents that are there were in the billfold.

Mr. Schnacke: I will offer the billfold and the documents just described by the witness for identification, to be marked Government's exhibit next in order.

(Thereupon billfold and documents referred to [224] were marked Plaintiff's Exhibit No. 90 for identification.)

Mr. Schnacke: Q. Now, I will show you a brown wallet containing certain documents, and ask you if you saw that in the course of your search of the living room at the cabin?

A. Yes. This was found in a pair of tan gabardine trousers which were laying on the chair near the entrance to the cabin as shown by the chart.

Q. Will you examine the documents that I handed you? Will you tell me if you observed those during the course of your search?

A. Yes, I did, and they were in the billfold.

Mr. Schnacke: I will ask now that the billfold and the documents just referred to by the witness be marked Government's exhibit next in order for identification only.

(Thereupon billfold and documents referred to were marked Plaintiff's Exhibit No. 91 for identification.)

Mr. Schnacke: No further questions. Thank you.

Cross Examination

Mr. Gladstein: Q. Just a question or two, Mr.

(Testimony of Clarence W. Dunker.)

Dunker: What time did you arrive there at Twain Harte?

A. You mean at the cabin where the individuals were?

Q. Yes. [225]

A. It was about 1:05 to 1:08, I believe, when I drove up there.

Q. What time did you leave Modesto?

A. I left Modesto approximately 11 o'clock.

Q. That morning?

A. The following—I mean the preceding evening.

Q. Eleven o'clock p.m.?

A. Eleven o'clock p.m. the preceding evening.

Q. On this same task or assignment?

A. Yes.

Q. Had you been to the premises before the 27th of August? A. No, I had not.

Q. When you left Modesto about 11 o'clock p.m. were you alone or with someone else?

A. I left alone.

Q. And you joined others somewhere, did you?

A. Yes, on route.

Q. You didn't go to the house that night?

A. No. You mean the Germany cabin? No, I did not.

Q. The first time you ever went there was the following afternoon at the time you have stated?

A. Yes.

Q. Were you in the area of Twain Harte during the morning, the early hours, of the 27th?

(Testimony of Clarence W. Dunker.)

A. Yes. [226]

Q. Were you with other agents near the premises?

A. Well, I drove by the premises, a road that leads some distance from the premises, but I didn't go up to the premises. It sets back a considerable distance from the road.

Q. What time of day was it when you drove by some little distance from the premises?

A. It was approximately 3 o'clock in the morning.

Q. When you drove by, did you occupy at any time a position from which you could see the house or its occupants? A. No.

Mr. Schnacke: Your Honor please, I am going to object because I don't see the propriety of this in view of the scope of the direct examination of this witness. He testified to a search of the living room.

The Court: Well——

Mr. Schnacke: What happened at 3 o'clock——

The Court: It is beyond the direct examination.

Mr. Gladstein: May I be permitted one more question?

Mr. Gladstein: Q. Were you alone or with others at approximately 3 o'clock in the morning?

A. I was with others.

Q. Will you tell me the names of the others?

A. Yes.

Mr. Schnacke: Well, if Your Honor please, I will make the objection that that is immaterial. I

(Testimony of Clarence W. Dunker.)

just don't understand [227] how this is proper cross examination in view of the scope of the direct.

Mr. Gladstein: There has been testimony concerning the first time certain agents appeared, and I believe it would be proper. Very limited.

The Court: It is a sort of discovery proceeding. I don't see that it bears—if it has any reasonable bearing on the direct examination, of course, the Court should allow it, but I just don't see it.

Mr. Schnacke: The agents are available to the defense to call as witnesses——

Mr. Gladstein: Mr. Schnacke says the agents are available for the defense to call as witnesses, but obviously I can't do that until I know who they are, and that is all I am asking for, who was with him at the time he went by there at 3 o'clock in the morning.

Mr. Schnacke: Then are you going to inquire as to the day before that and the day before that and six months before that?

The Court: Well, let's not get into an argument. I will sustain the objection.

Mr. Gladstein: Your Honor, this is a slightly different question.

Mr. Gladstein: Q. May I ask if the other persons who were with you at 3 o'clock in the morning were FBI agents, [228] without regard to their names?

Mr. Schnacke: Same objection.

(Testimony of Clarence W. Dunker.)

The Court: What difference does that make? Let's get through with this testimony.

The Witness: They were.

Mr. Gladstein: That is all, Your Honor.

The Court: Anything further?

Mr. Schnacke: No, that is all, thank you.

(Witness excused.)

Mr. Schnacke: Mr. Daly.

JOSEPH T. DALY

was called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury? A. Joseph T. Daly.

Q. Will you spell your last name?

A. D-a-l-y.

Direct Examination

Mr. Schnacke: Q. Mr. Daly, what is your occupation?

A. Special Agent of the Federal Bureau of Investigation.

Q. How long have you been an agent of the FBI? [229]

A. Eleven and one-half years.

Q. To what office are you assigned?

A. San Francisco Division.

Q. For how long have you been assigned to San Francisco? A. Nine years.

(Testimony of Joseph T. Daly.)

Q. Were you assigned to San Francisco in August and September of last year? A. I was.

Q. In the latter part of last year did you have occasion to go to a cabin at Twain Harte, California? A. I did.

Q. Is that the cabin at which four of the defendants in this case had previously been arrested?

A. That is correct.

Q. And on arriving at the cabin—. On what date did you go to the cabin?

A. August 27, 1953.

Q. And did you go to the cabin at a later date?

A. I did.

Q. What date was that?

A. On, I believe, September 2nd, 1953.

Q. And on September 2nd, 1953, what did you do at the cabin?

A. I was assigned to go through the garbage cans at the rear of the cabin and dust the cans for fingerprints.

Q. Did you do that? [230] A. I did.

Q. I will show you a box containing ten cans and ask you if you will look at those cans and tell me if you have ever seen those before, and, if so, when?

A. Yes, these are the cans that I found at Twain Harte on September the 2nd.

Q. Now, referring to the diagram before you, can you tell us where on the premises you found those cans?

A. On the chart, which shows the whole grounds.

(Testimony of Joseph T. Daly.)

the first page, it is assigned "outhouse". It is in the rear. It is labeled "outhouse." About 20 feet in the rear of the cabin.

Q. And were these cans inside that house or adjacent to it?

A. They were inside the house, in a garbage container.

Q. I see. That outhouse was used for what purpose?

A. It was a toilet that wasn't being used at the present time, but was being used to house the garbage can.

Q. And it was in the search of that little outhouse that you discovered these cans?

A. That is correct.

Q. You have mentioned dusting for fingerprints. Will you tell us what that means?

A. That is a process where you take a fine powder with a little brush, dust over the surface of the can in an attempt to have latent fingerprints be shown out. I preserved them [231] after that and identified the cans.

Q. And how did you preserve them?

A. With scotch tape over the prints.

Q. And did you mark the cans in any way?

A. I did.

Q. How did your mark them?

A. I marked them with my initials "JPD", and I scratched the date on the cans with a nail.

Q. And your initials then, would appear on each can that you have just examined?

(Testimony of Joseph T. Daly.)

A. That is correct.

Q. Did you develop latent prints on each of the cans that I have shown you previously?

A. On each of the cans there were latent prints shown to be on the cans.

Q. What did you do with the cans after you had assembled them at the cabin?

A. After putting the scotch tape over the prints, I returned them to one of my supervisors in San Francisco.

Q. Do you know what happened to them after that time?

A. No, not of my own knowledge.

Q. Mr. Schnacke: I will ask that the ten Budweiser beer cans described by this witness be received in evidence as a group at this time. I think it would be convenient for them to remain in the box. On the assurance that they will be [232] connected up by further testimony.

Mr. Gladstein: Well, may I ask counsel again which one or more of the defendants he intends to connect these up with, because my point of objection would depend on that statement.

Mr. Schnacke: The cans will be connected up with each of the defendants. One or more of the cans will be connected up with each of the defendants.

Mr. Gladstein: Each of the five?

Mr. Schnacke: Each of the five.

Mr. Gladstein: I make the same objection as I made before. There is no proper foundation laid.

(Testimony of Joseph T. Daly.)

The Court: Well, they are just—instead of putting them in for identification, he is putting them in evidence for the purpose of showing the limited purpose of where they came from, that is all.

Mr. Gladstein: He is not offering them just for identification, he is offering them in evidence.

The Court: But their value in evidence is only to the limited extent at this point. What are you wasting a lot of time about this for? Are you going to connect these up further with some other evidence?

Mr. Schnacke: Yes, with each of the defendants and with Robert Thompson.

The Court: All right, admitted for the purpose stated, [233] to get it over with.

(Thereupon the beer cans referred to above were received in evidence and marked Plaintiff's Exhibit No. 92.)

Mr. Gladstein: May the record show I have made the same objections to this last exhibit as to the previous exhibits?

The Court: Very well.

Mr. Schnacke: No further questions.

The Court: If it isn't connected up the Court will strike it out.

Mr. Gladstein: Of course my objection goes beyond that, Your Honor.

The Court: Anything else of the witness?

Mr. Schnacke: No, I have no further questions.

(Testimony of Joseph T. Daly.)

Cross Examination

Mr. Gladstein: Q. Mr. Daly, did you say you were up there on the 27th of August?

A. I was.

Q. And what did you do when you were there on the 27th?

A. On the 27th I was assigned as an auxiliary with no specific duties, to assist anyone that I should.

Q. And whom did you assist?

A. Mr. Whalen. [234]

Q. He was the agent in charge?

A. Agent in charge.

Q. Did you participate in the search that was made at that time? A. No, I did not.

Q. Did you observe a search was being made?

A. Yes.

Q. What portion of the yard or the premises did you observe under search?

A. I noticed that there were agents searching inside the house.

Q. Yes? Anything else?

A. Not to my recollection.

Q. Now, this was broad daylight at the time the people were taken into custody, wasn't it?

A. That is correct.

Q. The outhouse was plainly visible from the premises and the place where you were, is that so?

A. That is right.

Q. Did you go over there?

A. I did not.

(Testimony of Joseph T. Daly.)

Q. Did you observe anyone ever go over there?

A. No.

Q. What is that? A. I did not, no. [235]

Q. Did you say no one ever went there?

A. No, I did not. I didn't observe anyone go over there at the time.

Q. How many agents were there there at the time?

A. In the vicinity, approximately 15.

Q. How far was the outhouse from the premises?

A. About 20 feet.

Q. Was there a garbage can in the house?

A. I don't recall if there was or not.

Q. Did you see that the premises were searched thoroughly?

A. That wasn't my assignment at the time.

Q. I am asking you if you observed, if you saw whether the premises were thoroughly searched?

Mr. Schnacke: I object to that as calling for an opinion and conclusion of the witness.

The Court: Sustained.

Mr. Gladstein: Q. Were there agents outside of the house for a portion of the period?

A. Yes.

Mr. Schnacke: I object to that, as I should have objected all along, as being outside the scope of the direct examination.

Mr. Gladstein: The witness was asked if he was there on the 27th. That was on direct examination. I am now inquiring about it. He was asked if he had been there and he said he was there the 27th,

(Testimony of Joseph T. Daly.)

and he was asked if he [236] came at a later time.

The Court: Well, that doesn't, I think, open the door to most extensive cross examination, which should be confined to whether or not the man was there that day. That is the subject matter.

Mr. Gladstein: The 27th?

The Court: Yes.

Mr. Gladstein: Which man, Your Honor?

The Court: The man that is on the witness stand.

Mr. Gladstein: Yes, he said he was there.

The Court: That doesn't mean that that subject opens up everything under the sun. The only subject opened up for cross examination is whether he was there that day.

I am just saying that for the purpose of shortening the time. My inclination is to allow great liberality in cross examination if there is anything in the testimony that relates to the subject matter, but that is going a little too far afield.

Mr. Gladstein: Q. After the defendants—you saw the defendants taken into custody on the 27th, didn't you? A. I did.

Q. Did you remain after they had been taken away? A. I did.

Q. Were there others who remained with you?

A. There were. [237]

Q. How long, approximately, did you remain there? A. Till midnight.

Q. Approximately how many were there with you?

(Testimony of Joseph T. Daly.)

A. I believe three or four other agents.

Q. Were you stationed in or out of the house, or both in and out? A. Both.

Q. Did you go to the outhouse?

A. I did not.

Q. Did you observe any other agent go to the outhouse? A. No, I did not.

Q. Who were the agents who were with you there at midnight?

A. Mr. Dunker—Agent Dunker. N. L. White. Robert Savage. I believe there was another agent, but I do not recall his name.

Q. While you were there up to midnight—withdraw that.

By the way, without inquiring as to anything confidential about your duties with the Bureau, I would like to ask you whether your assignment at that time, or maybe generally, has something to do with the obtaining of fingerprints?

A. No, other than general criminal investigative work. I am not a fingerprint technician.

Q. But in your general work apparently you know something about obtaining them, is that right?

A. Latent prints, that is right. [238]

Q. What did you do, if anything, to obtain latent prints when you were there up until midnight? A. Nothing.

Q. What did anybody else, to your observation, do?

(Testimony of Joseph T. Daly.)

A. I didn't note anyone else taking prints in the house or around the house.

Q. So it is your testimony that nothing was done until you left the house at midnight on the 27th to look for and find any latent fingerprints?

Mr. Schnacke: That isn't his testimony at all, Mr. Gladstein. His testimony was that he didn't observe anybody doing it.

Mr. Gladstein: Q. Is Mr. Schnacke stating it correctly? A. That is correct.

Q. Did you later learn, sir, that some other agents of the FBI had sought to obtain latent fingerprints at or about the premises that day?

Mr. Schnacke: I will object to that as calling for hearsay and an opinion and conclusion of the witness.

The Court: Sustained.

Mr. Gladstein: Q. Now, the other agents and you, did you take up until midnight some station or something to prevent or keep people out?

Mr. Schnacke: I am going to renew my objection that this is immaterial, beyond the scope of the direct examination. [239]

The Court: Well, I think that counsel may be within limits if he wants to show what the situation in the locality was, for whatever he feels it is worth.

Mr. Gladstein: Thank you, Your Honor.

The Witness: My duties up to midnight were, after Mr. Whalen left with the agents, I was

(Testimony of Joseph T. Daly.)

guarding the premises. Assisting in guarding the premises.

Mr. Gladstein: Q. Guarding the premises against what? A. Intruders.

Q. Were the premises kept under guard by you until midnight—you and the others?

A. That is correct.

Q. And by the premises, what do you mean?

A. The house at Twain Harte. The cabin where the agents were located.

Q. The house itself?

A. Yes, the house itself. [240]

Q. The house itself?

A. The house itself.

Q. What about the outhouse? Did you guard that? A. Not specifically.

Q. Did any of the agents with you guard the outhouse?

A. The way the grounds are set up, there is one roadway to it. We were in the house, and looking around in the area around the house, we were not specifically guarding the outhouse; we were guarding the general area.

Q. Let me put it this way: While you were there until midnight or thereabouts, you and the other agents who were with you did have the house under guard? A. Yes.

Q. To prevent intruders, as you said, and did anybody come and intrude? A. No.

Q. Did you have the outhouse under such ob-

(Testimony of Joseph T. Daly.)

servation as to be able to say to us under oath whether anybody went in there?

A. I would say that no one had gone in there, although we did not have it under direct observation all the time.

Q. So you do not know, is that it?

A. That is correct.

Q. You left about midnight of the 27th?

A. Yes.

Q. Was there anybody left there in charge?

A. No.

Q. All the agents left at the time?

A. Yes.

Q. Nobody came to replace you, or whatever the expression is?

A. No, no one came to replace us.

Q. So from midnight on the house was left unguarded? A. Yes.

Q. The outhouse as well? A. Yes.

Q. Was that the situation that obtained until the 2nd of September, to your knowledge?

A. Yes.

Q. On the 2nd of September you returned for the first time to the premises? A. Yes.

Q. You had an assignment to perform?

A. Yes.

Q. What was the assignment?

A. To dust the cans in the garbage can?

Q. Who told you there were cans in the garbage can? A. Mr. Al Clark.

Q. Is he an agent? A. Yes.

(Testimony of Joseph T. Daly.)

Q. When did he tell you that?

A. On the 2nd he asked me to go up and I left and went up. [242]

Q. Did he specifically mention cans in the garbage can? A. Yes.

Q. Did he tell you where the garbage can was located? A. Yes.

Q. Where did he say they were located?

A. In the outhouse.

Q. Was he with you on the 27th?

A. Earlier in the day.

Q. He was with you on the 27th at the premises?

A. Yes, in the original raiding party.

Q. In the original raiding party?

A. Yes.

Q. Did you go to the outhouse on the 27th, inside of it?

Mr. Schnacke: I submit that has been asked and answered.

Mr. Gladstein: I am not sure I did ask it, if Your Honor please. If I did, I ask permission again to ask it.

The Court: Q. Do you remember whether you went there on the 27th?

A. I don't recall whether I specifically went there or not.

Mr. Gladstein: Q. Did you finish your answer?

A. Yes.

Q. Did you observe Mr. Clark go there?

A. No, I did not.

Q. At the time you left at midnight did you

(Testimony of Joseph T. Daly.)

take any of the contents of the house with you?

A. No, I did not.

Q. Did any of those with you take anything from the house?

A. I don't recall. I left by myself. The other agents left. We had our own cars, and I don't recall whether they did or not.

Q. Did you observe Mr. Erickson there that day? A. Yes, I did.

Q. Did you observe him taking or requiring others, asking others to take large quantities of documents and other things out of the house?

A. Will you restate the question?

(Question read.)

The Court: That is a pretty complicated question: Did he see anybody or did he see anybody required——

Mr. Gladstein: I will withdraw it.

Mr. Gladstein: Q. Did you see Mr. Erickson taking things out of the house and taking them away? A. No, I did not.

Q. Did you see anybody else do that? I mean any other agent?

A. No, I don't recall seeing any agent taking anything out of the house.

Q. Were there any cans, open or closed, of beer in the premises that you were in? A. Yes.

Q. On the 27th?

A. On the 27th, yes. [244]

Q. Where did you see them?

A. There were cans in the kitchen, some opened,

(Testimony of Joseph T. Daly.)

some—I think there was a case of six cans that were in the kitchen—beer cans you are speaking of——?

Q. Yes.

A. Beer cans in the kitchen also.

Q. Can you tell us how many there were?

A. No, I didn't count them. I imagine empty beer cans around the kitchen, there appeared to be four or five.

Q. Did you place any mark on any of them?

A. No, I did not.

Q. Did you see anybody else do so?

A. No, I did not.

Q. When you got back on the 2nd of September did you observe whether or not those beer cans were there? A. I did not.

Q. You went directly to the outhouse?

A. That is correct.

Q. This was Mr. Clark telling you that there were some cans in the garbage can?

A. The garbage was contained in the outhouse in the rear of the cabin, and to dust those cans for latent fingerprints.

Q. He told you there were such cans, did he?

A. Yes.

Q. Was there anything else that he told you that you can [245] recall as to what your assignment or instructions were?

A. No, I don't recall anything in addition.

Q. What kind of garbage can was this in which you found these cans?

(Testimony of Joseph T. Daly.)

A. I believe it was a heavy composition paper-type barrel, garbage disposal, make-shift barrel where they store the cans.

Q. Was it a barrel or a crate?

A. A barrel, a round affair. It could possibly have been metal. It was a round barrel affair.

Q. Did you dust the barrel for any latent fingerprints? A. No, I did not.

Q. Did you dust the outhouse, any part of it, for latent fingerprints? A. No, I did not.

Q. Did you dust anything in the house itself for any latent fingerprints? A. No, I did not.

Q. Did you dust any of the documents or boxes, suitcases, and so forth, for latent fingerprints?

A. No.

Q. What equipment did you take up there with you?

A. It is a small kit with fingerprint dusting powder, a small camel's hair brush, it also includes a flashlight and a small camera to take photographs of fingerprints.

Q. A camera to take photographs of fingerprints? [246]

A. Yes. It is included in the kit. You asked me what equipment I took.

Q. Yes. A. That is what I took.

Q. Did you go alone or were you accompanied by somebody? A. I was alone.

Q. In doing your work there at the outhouse with these cans, you were alone? A. I was.

(Testimony of Joseph T. Daly.)

Q. Where did you perform the actual taking of the latent fingerprints?

A. Out on the ping-pong table that was there on the side of the cabin in the game and parking area, as shown on the map.

Q. Before you went there on the 2nd were you provided with any fingerprints of any kind?

A. No, I was not.

Q. Had you seen any of these defendants?

A. No.

Q. Will you tell us how you proceeded to take the cans from the location in which you first found them to the place where you did the dusting?

A. I took the whole garbage can, brought it up next to the ping-pong table, took each can one by one, and dusted them with the powder. Then I put them in a container. If there appeared to be latent prints produced on the cans, I would put scotch [247] tape over the prints. I identified the cans with my initials and the date and put them in another container.

Q. Do you recall how many cans you found latent fingerprints apparently on?

A. I do not.

Q. Can you tell us anything at all about the latent fingerprints you did find on any can?

(Question read.)

Mr. Schnacke: I think that is a kind of broad question.

Mr. Gladstein: Maybe it is broad, in which case I will particularize it.

(Testimony of Joseph T. Daly.)

Mr. Gladstein: Q. You have told us that you examined a number of cans? A. Yes.

Q. Do you remember the exact number?

A. I do not.

Q. You do not remember the number of cans on which you found any fingerprints at all?

A. No, I do not.

Q. Is it correct that there were cans on which you found no fingerprints? A. Yes.

Q. But you do not know how many?

A. Yes.

Q. You are saying on some cans you did find some fingerprints? [248] A. Yes.

Q. You can't tell us on how many?

A. No.

Q. Can you tell us what prints, that is, in number or anything about them that you found on any particular can or any of them?

Mr. Schnacke: You mean whose prints, Mr. Gladstein?

Mr. Gladstein: No, I didn't ask him that.

Mr. Gladstein: Q. For instance, let me ask this: Did you make a record or a notation, a report or notation on a can to indicate—I say this by way of illustration to you—that you saw what appeared to be a thumbprint or an entire set of prints?

A. No.

Q. You did not do that? A. No.

Q. Do you have any recollection of whether you found on any of the cans any full set of prints?

A. Yes, I can recall that I did not.

(Testimony of Joseph T. Daly.)

Q. You did not? A. Yes.

Q. Can you recall the extent to which you found any prints on any of the cans?

A. Yes, some would have one fingerprint, some would have two, three, maybe four. On different portions of the can there [249] would be several. It varied with the different number of cans.

Q. So that those cans on which you found what appeared to be some latent prints you placed a piece of scotch-tape on them?

A. Over the print, yes.

Q. Then what did you do with the cans?

A. I put them in a container and returned them to Al Clark in San Francisco, Agent Clark in San Francisco.

Q. When? A. The very day.

Q. What did you do with the cans on which you found no prints?

A. Disposed of them, left them there.

Q. Where? A. Where I obtained them.

Q. Where was that?

A. In the outhouse.

Q. You took them right back to the outhouse?

A. Yes.

Q. And put them in the barrel? A. Yes.

Q. Were all the cans that you took back to San Francisco empty or were some full?

A. All empty.

Q. The last time that you ever saw those cans then up to [250] today was when you turned them over to Mr. Clark? A. Yes.

(Testimony of Joseph T. Daly.)

Q. And before coming in this afternoon you had not again seen these?

A. Yesterday I glanced at them—yesterday I did glance at the cans, yes.

Q. Where were you when you glanced at them?

A. I think they were in Mr. Schnacke's office.

Q. What kind of piece of paper or other marking was it that you placed on the can?

The Court: He said several times scotch-tape.

Mr. Gladstein: Q. Is the tape still on them?

A. I believe so, yes.

Q. On all of them you can identify it?

A. Yes.

Q. Did you wrap these cans in the cellophane in which they now are? A. No.

Q. Will you examine those and tell us if you find a tape on each one of them?

A. Each individual can or do you want one as an example?

Q. Give me one as an example, if you will, first.

A. Right here (indicating). It is hard to see. There is scotch-tape there, see? This is holding—this is broad scotch-tape going completely around the can. [251]

Q. This one that you are showing me?

A. Yes, right here.

Q. Will you take the trouble to look through each of those and see if you find a piece of scotch-tape on each?

(Testimony of Joseph T. Daly.)

The Court: Q. Does that have any effect on whatever is under the scotch-tape?

A. No, it is being preserved. I am just ascertaining if there is a scotch-tape, as he requested, on each can.

(After examining the cans referred to:)

A. (Continuing): Yes, there is scotch-tape on each can.

Mr. Gladstein: Q. How many cans are there?

A. Ten.

Q. Is there any mark on the cans that identifies them to you? A. There is.

Q. What is it?

A. My initials, J.T.D., and then the number 9253, which stands for September 2nd, 1953.

Q. That appears on each of them?

A. Yes.

Q. Where did you place those initials on the cans? A. On the end of each can.

Q. I mean where were you when you did that?

A. Right there at the scene after dusting them by the cabin.

Q. Did you dust anything besides those cans?

A. Yes.

Q. What else? [252]

A. Other articles in the garbage can.

Q. What?

A. Well, there was a mustard jar, I think there was a catsup bottle, mostly beer cans. That is all. that I can recall.

(Testimony of Joseph T. Daly.)

Q. Did you dust anything for prints that was anywhere else than in the garbage can?

A. No, I did not.

Q. When you went to the premises there on the 2nd of September did you have any authority by way of search warrant? Did you have a search warrant with you? A. No, I did not.

Q. Did you seek the permission of anyone to make that search?

Mr. Schnacke: I will object to that as being immaterial, Your Honor please.

The Court: Sustained.

Mr. Gladstein: Q. Do I understand you are regularly connected with the Department here in San Francisco? A. That is correct.

Q. And generally available here?

A. That is correct.

Q. So if there were any requirements of getting further testimony from you, you would generally be available here?

A. Yes, I am assigned to the San Francisco office. I am a resident agent at Stockton, but I am available. I am assigned to San Francisco but I reside at Stockton, California, but I [253] am available.

Q. Just one further question: When you went up there on the 27th did you go from San Francisco or Stockton? A. The 22nd?

Q. The 27th.

Mr. Schnacke: I will object to that as immaterial.

(Testimony of Joseph T. Daly.)

The Court: Sustained.

Mr. Gladstein: Q. When you went up there on the 2nd did you proceed from San Francisco or Stockton?

Mr. Schnacke: Same objection.

The Court: Same ruling.

Mr. Gladstein: That is all.

Redirect Examination

Mr. Schnacke: Q. Did you manufacture these fingerprints on here? A. I did not.

Q. Did you use any trick or device to get somebody to put those fingerprints on there?

A. I did not.

Q. Do you have any way of knowing what agents of the F.B.I. might or might not have been in the outhouse on the 27th? A. I do not.

Q. Or on the 28th, 29th or 30th?

A. I do not. [254]

Mr. Schnacke: That is all.

The Court: Anything else?

Mr. Gladstein: Yes.

Recross Examination

Mr. Gladstein: Q. Do you have any way of knowing how the beer cans got into the container in which you found them on the 2nd of September?

A. No, I do not.

Q. Do you have any way of knowing how they were brought to the premises by the 2nd of September? A. Excuse me?

(Testimony of Joseph T. Daly.)

Q. How they were brought to the premises?

A. No.

Q. Do you have any way of knowing when they first came to the premises and went into that container? A. No.

Q. Do you have any way of knowing whether those prints are a day old, five days old or five months old at the time you found them?

A. A day—repeat that, please.

Q. Do you have any way of knowing whether at the time you found the prints on those cans they were a day, five days or five months old?

A. As I understand, a print five months old will not come out like these prints came out. Not being an expert, I would say [255] I have no way of telling what length of time the prints were on the cans, no.

Q. Do you have any way of knowing where a person could have been who put fingerprints on or held any of those cans on which the prints went?

A. No.

Q. Do you have any way of explaining to us why you did not take those cans into your custody and dust them for fingerprints on the 27th of August, at the time of the arrest?

Mr. Schnacke: I object to that.

The Court: That is argumentative. Sustained.

Mr. Gladstein: That is all.

The Court: We will take an adjournment now, ladies and gentlemen of the jury, until tomorrow

morning at 10:00 o'clock. Please return at 10:00 o'clock.

(Whereupon this cause was adjourned to the hour of 10:00 o'clock a.m., Thursday, April 15, 1954.) [256]

The Clerk: United States vs. Kremen, et al., further trial.

Mr. Schnacke: Ready, Your Honor. Call Henry Warren.

Your Honor please, this is a witness going on somewhat out of order, but for his convenience and because he is a short witness we will put him on at this time.

HENRY JAMES WARREN

called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. Henry James Warren.

Q. Speak up a little louder, please.

A. Henry James Warren.

Q. W-a-r-r-e-n? A. Yes.

Direct Examination

Mr. Schnacke: Q. Mr. Warren, what is your occupation?

A. Senior plant quarantine inspector, California Department of Agriculture. [259]

Q. You are employed by the State of California? A. Yes, sir.

(Testimony of Henry James Warren.)

Q. On August 20th, 1953, where were you stationed?

A. At Dorris, California; the inspection station there, sir.

Q. Where is that inspection station located with respect to the California State border and the highway in California?

A. It is on Highway No. 97. It comes from Klamath Falls down the Lead.

Q. How far is that from the State Line?

A. About four miles, sir.

Q. What is an inspection station, as you have described it?

A. The State of California maintains an inspection station at each of their ports of entry for the covering of laws and regulations set up by the Department of Agriculture to prevent the entry of insects and plant diseases into our state.

Q. With respect to incoming automobiles, what do you do? What does the inspection station do?

A. We stop all incoming cars and merely check the baggage, the car contents, household goods, to see if there are any plant materials within the car or the baggage.

Q. And is some record made of this inspection?

A. Yes, sir, we maintain a record.

Q. Are those records maintained in the ordinary course of business of the inspection station?

A. Yes, sir. [260]

Q. At my request have you brought certain records with you? A. Yes, sir.

(Testimony of Henry James Warren.)

Q. Do you have them on your person?

A. I have left them on the chair. Would the Court excuse me long enough to get them?

Mr. Schnacke: Yes, please.

(Witness left the witness stand and returned.)

Mr. Schnacke: Q. What record have you got with you?

A. We have the daily record that we maintained for August 20, 1953.

Q. Are those records just of that day?

A. Yes, sir.

Q. And what information is reflected on those records?

A. On each car that enters the state a record is maintained of the license of the car and the number of occupants of the car.

Q. The license number and the number of occupants? A. Yes, sir.

Q. And included within the license number, is the state issuing the license also designated?

A. Yes.

Q. Unless it is the State of California, I take it, and then there is no such designation?

A. Yes.

Q. Is the time of entry noted in any way? [261]

A. Yes, sir, we have the time the sheet was started and when it is completed. There are 50 cars to a sheet.

Q. By looking at that sheet you can tell within

(Testimony of Henry James Warren.)

a time period when that car entered, but not the exact time the car entered, is that right?

A. Yes, sir.

Q. Mr. Warren, I notice a column divided into two parts that is headed, "Passengers." Under that is "Cal" and then the other column "For." What is that for?

A. It is what number of passengers is from California or foreign passengers. We designate them the same as the license. We make a division between California cars returning and a foreign car entering.

Q. And all passengers in a car bearing a California license are deemed to be Californians, is that the procedure? A. Yes, sir.

Q. You don't ask each person coming in what his state of residence is? A. No, sir.

Mr. Schnacke: I will offer the document described by this witness as Government's exhibit next in order; and I will ask that the document, being a State of California document, may be withdrawn at a later time and a photostat of the entire document substituted.

Mr. Leonard: We object to the introduction in evidence of [262] the document on the ground no proper foundation has been laid. It is incompetent, irrelevant and immaterial.

The Court: Well, there is only some part of it, I suppose, you want?

Mr. Schnacke: Only some part of it, yes, Your Honor.

(Testimony of Henry James Warren.)

The Court: Can't you read what you want?

Mr. Schnacke: Suppose I introduce the document for identification at this time, and for identification only at this time?

The Court: Whatever you wish. I was just wondering whether you want to encumber the record with something that has many pages if there is only a small part of it you wish.

Mr. Schnacke: Well,——

The Court: Can't you agree on the particular part that you want?

Mr. Gladstein: We will agree, Your Honor, that counsel may refer to just that portion of it he wants to refer to. We don't raise any requirement that the whole document be used, nor do we have any objection to its being withdrawn and photostatic copies substituted. It is simply the legal objection.

The Court: Why don't you read what you want into the record? Wouldn't that serve the purpose?

Mr. Schnacke: Yes, it would.

The Court: I am thinking about a long document going into [263] the record when you only want a part.

Mr. Schnacke: I will offer in evidence at this time the top notation in the right-hand column on Sheet No. 10 of the document described by the witness.

Mr. Leonard: To which we object, if Your Honor please, on the ground no foundation has been laid. It is incompetent, irrelevant and immaterial.

(Testimony of Henry James Warren.)

Mr. Schnacke: I will promise to connect it up.

The Court: May I see it?

(Document handed to the Court.)

The Court: The top line of——

Mr. Schnacke: The right-hand column.

The Court: You are offering it for the purpose of showing that on that day a car described came into California?

Mr. Schnacke: Yes, Your Honor.

The Court: All right, I will overrule the objection.

Mr. Schnacke: On page 10 of the document described by this witness, which reads, "Time started 3:30 p.m.; time finished 4:20 p.m., dated August 20, 1953."

The entry to which I have referred shows, "Passengers, foreign — f-o-r — four. Car number. State. Car number C-54-274. State: Missouri."

Is there any objection to this document being returned to the files of the State of California?

Mr. Gladstein: No objection on that score. We might want [264] to use it for examination, Mr. Schnacke.

Mr. Schnacke: It will remain, then, marked for identification until——

Mr. Gladstein: No, I didn't mean that.

The Court: He simply means he wants to wait until he examines.

Mr. Schnacke: Oh. I have no further questions of Mr. Warren.

(Testimony of Henry James Warren.)

Cross-Examination

Mr. Gladstein: Q. Mr. Warren, approximately how many inspection stations are there, if you can tell us, at the boundaries of the State of California?

A. Yes, sir. The State maintains around 18 summer seasonal, opened around during the summer months and close down, but as a general rule about 18.

Q. So there would be about 18 during the month of August? A. Yes, sir.

Q. Can you tell us when you first received an inquiry, if you did receive one, concerning this item that you have brought a record of?

A. Several months ago there was an F.B.I. agent come to the station there and asked to see our records, showed his credentials, and on a certain date, and we got them out, which we cooperate with everyone, and let him examine them, and at [265] that time no mention was made——

Q. (Interposing) I understand. All I want to know is when it happened. A couple of months ago?

A. Yes.

Q. Can you fix that as precisely as you can? This is April. About mid-April of 1954.

A. Several months ago, sir. It is rather difficult. It is rather routine. We don't set it aside. Within the last six months, seven months. Within that period. Could only be three. You are trying to establish when they asked for the record, sir?

Q. Yes. When they came down and wanted to look at your records.

(Testimony of Henry James Warren.)

A. Sometime after that August date. Within the last four, five, six months, maybe.

Q. Can you tell us whether it was in 1954 or 1953?

A. No, sir. It would make no difference, would it?

Q. You will pardon me, sir——

The Court: He just wants to know if you remember. If you don't remember——

The Witness: A. No, sir, I don't remember.

Mr. Gladstein: Q. When the F.B.I. agent said he wanted to look at your records, did he indicate to you what particular record he wanted to look at?

A. Yes, sir, he asked to see our daily record of the cars entering the State on a particular day or within a certain [266] period.

Q. Which was it?

A. I mean to say, he wanted the records of a certain period of days. Probably covering within that period.

Q. I don't want any "probably." Did you have a conversation with him? A. No, sir.

Q. Then you don't know what he asked for, do you?

A. I know he wanted to see the records. I come in when he was looking through the record.

Q. He had already had it? You saw him, at the time you came in, already there?

A. Yes, sir.

Q. And was it some other member of your station or employee there who was with him?

(Testimony of Henry James Warren.)

A. Yes, sir.

Q. Somebody else had turned this record over to him?

A. Yes. We make it available to anybody that asks.

Mr. Gladstein: I move that be stricken, Your Honor.

The Court: Well, it isn't important.

Mr. Gladstein: No, it isn't important.

Mr. Gladstein: Q. Then you don't know yourself what that F.B.I. agent asked for prior to the time you got there, isn't that right?

A. I would assume he asked to see the record. He was looking [267] at it.

Mr. Gladstein: I am going to move to strike that, Your Honor.

The Court: Well, it is obvious he doesn't know.

Mr. Gladstein: Q. Did you talk to this F.B.I. agent yourself? A. Yes, sir.

Q. All right. At the time you first saw the F.B.I. agent, did you observe whether he had records for one day, three days or a week, or anything of that sort?

A. He had them for quite a period of time.

Q. I see. Did he tell you whether he was looking for a particular registration number?

A. No, sir.

Q. When he left, did he take with him any of your records? A. No, sir.

Q. At the time that he left had any marks been

(Testimony of Henry James Warren.)

made by him on your—or anybody else in your presence, on any of your records? A. No, sir.

Q. The information that has been read by Mr. Schnacke appears on a page on a line in which there are two parallel lines in red crayon or pencil, is that so? A. Yes.

Q. At the time the F.B.I. agent left you those marks were not [268] on this page?

A. No, sir.

Q. What is that?

A. They weren't on the page when he left.

Q. Did you put them on there? A. Yes.

Q. When?

A. About a week ago, when we received the letter to come down here, so I could identify them at a future time.

Q. Is this your writing on this first line?

A. No, sir.

Q. That is the information that Mr. Schnacke read in. That wasn't written by you?

A. No, sir.

Q. So you can't state, can you, of your own knowledge, that that information was accurate, yourself?

A. Yes, sir, I can. I depend completely on what my men write there.

Q. Ever make a mistake?

A. We are human.

Q. That means you sometimes do, doesn't it?

A. I wouldn't say on a license. That is almost

(Testimony of Henry James Warren.)

our profession. That is something we hardly ever miss.

Q. What about the number of people?

A. Almost as accurate. [269]

Q. Do you ever make a mistake?

A. I don't think I have to answer that, do I?

Mr. Schnacke: We will stipulate that the witness is human.

Mr. Gladstein: Will you also stipulate——

The Court: Come on, get on with it.

Mr. Gladstein: ——that humans err?

The Witness: Stick to the record there.

Mr. Gladstein: Will Your Honor pardon me a moment?

Mr. Gladstein: Q. Now, on the 20th of August, sir, how many inspectors—. Is that your title, Inspector? A. Yes.

Q. How many inspectors other than yourself were on duty at that station?

A. Usually, two. Sometimes three to a shift, and we work around the clock.

Q. Can you tell us, if you remember, how many of you were on duty between 3:30 p.m. and 4:20 p.m. that day? A. Yes, sir.

Q. How many?

A. Two, sir. Possibly three. I work an overlapping period in there sometimes during the heavy hours. But at the moment I would say there were just two on duty when that car went through.

Q. On this particular sheet that Mr. Schnacke asked you [270] about, is that sheet kept by one of

(Testimony of Henry James Warren.)

you or both of you, if there are three on duty, do all three write on the same document? A. Yes, sir.

Q. You all do? A. Yes, sir.

Q. You have it located in some central place, is that right?

A. Yes. It is on a clip board that sets on the table and cars coming in stop beside the table.

Q. Is there a tabulation here of the number of cars that passed through that station that day?

A. Not on there, but we do it 50 cars to a page.

Q. I see. You count the number of pages and that would tell you, is that right? A. Yes, sir.

Q. Take a look at that and see. Am I correct in saying that the last page is numbered 17, and it seems to be full, so you would take 17 times 50 cars?

A. Yes. There is another page with five. Seventeen full pages and five additional.

Q. The total number of cars that day would be 17 times 50 plus five? A. Yes, sir.

Q. Just another question, sir: That station that you were at is located on what highway? [271]

A. 97, sir.

Q. Is that a national highway?

A. California. Ties into the national highway.

Q. Well, I am just trying, if you will help me—I don't know the exact terms. Is it an important highway, one of the main highways?

A. Yes, sir.

Mr. Gladstein: That is all.

(Testimony of Henry James Warren.)

Redirect Examination

Mr. Schnacke: Q. What are the principal cities to the north and south of Dorris on that highway?

A. Directly above the station going north is Klamath Falls, Oregon, which eventually leads on —you can go into Washington, Oregon, or branch off to Montana and Idaho.

Q. And to the south?

A. Leads back into Weed to Highway 99 and then becomes Highway 99.

Q. So Dorris is between Klamath Falls and Weed, generally? A. Yes, sir.

Mr. Schnacke: That is all.

(Witness excused.)

Mr. Schnacke: Mr. Smith. [272]

FRANK J. SMITH

was called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the Jury?

A. Frank J. Smith.

Direct Examination

Mr. Schnacke: Q. Mr. Smith, what is your occupation?

A. I am a special agent for the Federal Bureau of Investigation.

Q. And to what office are you assigned?

(Testimony of Frank J. Smith.)

A. The New York Office.

Q. How long have you been assigned to the New York Office? A. Eight years.

Q. And how long have you been a member of the FBI? A. Thirteen years.

Q. And on August 27 of last year were you in the vicinity of Twain Harte, California?

A. Yes, sir, I was.

Q. Did you participate in the arrests that were made at the cabin on that date?

A. Yes, I did.

Q. Are you acquainted with a Robert G. Thompson? [273] A. Yes, I am.

Q. For how long have you known him?

A. Oh, I have known Robert Thompson from about 1949 to this date—to the present.

Q. I will show you Government's Exhibit 2 and ask you if that picture represents Robert Thompson as you have seen him on any occasion?

A. Yes, this is the way Thompson appeared on August 27, 1953, at the time I arrested him.

Q. Is that the way he appeared in 1949 when you saw him? A. No, not at all.

Q. How did he look in 1949?

A. Well, he had dark brown hair and he had his hair—wore his hair much longer. He had a crew cut in this picture there at the time we arrested him. His hair was dyed red. He had a mustache, had a reddish mustache, and his eyebrows were red. His complexion was a brown. When I knew him in the past he had an apparently sallow complexion.

(Testimony of Frank J. Smith.)

He wasn't the color he was at the time we saw him.

He weighed about 41 pounds heavier on August 27, 1953, than he had when I saw him prior to that, which was about May 1st, 1951. He had a definite stomach, quite a large stomach, which he didn't have before. He was a husky built fellow, but he was quite fat in this picture here.

Q. Now, you say the last time you saw him prior to August [274] 27, 1953, was in May 1951, is that right? A. That is right, May of 1951.

Q. Between May of 1951 and the time you first saw Robert Thompson, on how many occasions did you see him?

A. Oh, I must have seen Thompson several hundred times.

Q. Was that in connection with your employment?

A. Yes, that is right. I saw him at the Communist Party headquarters, and about the time of the trial in New York.

Q. You were in attendance at that trial and observed him there? A. Yes, I did.

Q. What time did you arrive at the Twain Harte cabin on August 27, 1953? A. At 1:05 p.m.

Q. You arrived with the arresting party?

A. Yes, that is right.

Q. After you arrival, will you tell us what you did with respect to Robert Thompson or any of the defendants?

A. Well, after my arrival there, the agent in charge had announced that the fugitives were under

(Testimony of Frank J. Smith.)

arrest. The others were charged with harboring. I was directed——

Mr. Gladstein: (interposing) I object to that and ask the witness give his testimony, not in a conclusionary form, but in terms of what he said and heard and observed.

Mr. Schnacke: Q. Did you hear the agent in charge give [275] that announcement?

A. Yes, I did.

Q. What happened after that?

Mr. Gladstein: Just a moment. That is ambiguous. Make what statement? There were two statements the witness mentioned, if Your Honor please.

The Court: Well——

The Witness: A. I heard the agent in charge announce that the two fugitives were under arrest and that the others—and the fact that the other persons in the cabin were being charged with harboring the fugitives. [276]

Q. What did you observe or do thereafter?

A. I went to Thompson and asked him who he was, and he wouldn't talk to me. He wouldn't say anything. I knew Thompson and he knew me.

Mr. Gladstein: I am going to object to any conversations between this witness and Thompson. It is hearsay, no proper foundation laid, and it will be incompetent, irrelevant and immaterial.

The Court: The last answer may go out as the opinion and conclusion of the witness.

Mr. Schnacke: If Your Honor please, the first

(Testimony of Frank J. Smith.)

part of the last answer, the question made and the refusal to answer by Thompson may stay in?

The Court: I did not mean that part. The part of the answer in which he said Thompson knew him calls for a conclusion.

Mr. Schnacke: Q. What did you do thereafter?

A. I remained with Thompson. He was fingerprinted. At the time he was printed I was there with him. He denied his identity at that time. He still would not talk about who he was.

Mr. Gladstein: I am going to object to that and move that it be stricken unless the proper foundation is laid.

The Court: Have him state who was present and what the conversation was. [277]

Mr. Schnacke: Q. Who was present at the time he was being fingerprinted?

A. Roy Erickson, Agent Roy Erickson was there and I was there. They were the two ones that I recall immediately.

Q. Were there other agents present?

A. There were other agents there, yes.

Q. Where was this in the area?

A. Right immediately in front of the cabin.

Q. In the yard in front of the cabin?

A. In the yard, yes, in front of the cabin.

Q. Who spoke to Thompson and what if anything did Thompson say in reply at that time?

A. I spoke to Thompson—do you mean in connection with——

Q. At the time of the fingerprinting.

(Testimony of Frank J. Smith.)

A. Well, I spoke to him for one and asked him if he would sign the card, and he would not sign the card.

Q. Did he say something in response to your statement to him or to your request of him?

A. He either shook his head or indicated in the negative he would not sign it.

Q. Did he speak at all during the time that you were with him?

A. Not at the time at the cabin. On our trip back to San Francisco I talked to him.

Q. It was not until the trip back to San Francisco that you [278] heard him say anything?

A. Anything intelligent. He would shrug his shoulders. He would indicate he did not want to talk.

Q. After the fingerprinting what occurred between yourself and Mr. Thompson?

Mr. Gladstein: If Your Honor please, this is objectionable. It is not competent, relevant or material concerning these defendants.

The Court: You are referring now to what place? At the cabin?

Mr. Schnacke: Yes, Your Honor, at the cabin, immediately after the fingerprinting. I was asking him for the next actions that took place.

The Court: I will overrule the objection.

The Witness: A. After Thompson was fingerprinted he was photographed, and thereafter we prepared to go back to San Francisco. At the time of the arrest Thompson was dressed in a pair of

(Testimony of Frank J. Smith.)

Khaki pants. He had no shirt on, and he asked if he could have something to put on when it was apparent that he was going to be brought back to San Francisco. So I asked him where his clothes were, and one of the other agents,—Thompson told the agent that his clothes were up in the bedroom in the cabin, and one of the other agents, Agent McCann, went up to the room and brought down the suit Thompson had described. The first suit that he brought down Thompson said was not his. [279] However, a gray sport shirt that he had, Thompson admitted was his and he put the sport shirt on. The agent went back to the room and brought down a second suit, a cord suit, which Thompson admitted was his suit. He didn't put the suit on at the time, however. He carried it with him, went out, and got in the Bureau cars and came back to San Francisco.

Mr. Schnacke: Q. Did you examine that suit?

A. Yes, I did.

Q. Did you find anything in that suit?

Mr. Gladstein: May we have the time and place established of the examination and the persons present?

Mr. Schnacke: Q. Where was it that you examined this, Mr. Smith?

A. The suit was examined right at the cabin as he brought it down.

Q. Was that outside the cabin?

A. No, inside the cabin before I came out with him. Immediately when the suit was brought down it was examined to see if anything was in the suit.

(Testimony of Frank J. Smith.)

Q. I will show you a document and ask you if you have ever seen that before, and if so when and where?

A. Yes, I have. I first saw this document on August 27th and it was a certification of birth. It was in Thompson's coat. It was in the coat I just described, in the suit that we brought downstairs that he said was his. [280]

Mr. Schnacke: I will offer that document in evidence as Government's exhibit next in order.

Mr. Gladstein: If Your Honor please, I object to this upon the ground it is not binding upon any of these defendants. There is no proper foundation laid for introducing it against these defendants.

The Court: If it relates to the identity of the person named in the indictment——

Mr. Gladstein: Not as defendant.

Mr. Schnacke: A co-conspirator, Your Honor.

Mr. Gladstein: Maybe so.

Mr. Schnacke: There is ample evidence as of this time to justify the admission of this document in the opinion of the Government.

Mr. Gladstein: I trust my objection. I do not think the proper foundation has been laid to show any connection with these defendants.

The Court: Overruled. It may be admitted.

(Whereupon the document referred to above was thereupon received in evidence and marked Government's Exhibit 93.)

Mr. Schnacke: If Your Honor please, on Government's Exhibit 93 there is a stamp on the reverse

(Testimony of Frank J. Smith.)

indicating the circumstances under which this document has previously been used, and it is clear that that stamp was not on the document at the time it was obtained by Agent Smith. It is a court stamp.

The Court: Very well. It is not a part of the exhibit.

Mr. Schnacke: It is not part of the exhibit.

Mr. Schnacke: Q. Mr. Smith, I will show you a booklet and ask you if you have ever seen that booklet before and if so when and where?

A. Yes, I have seen this booklet on August 27th, 1953, at the cabin at Twain Harte.

Q. Where?

A. It was in the pocket of Thompson's suit, the suit that he identified as his.

Q. Was that in the same pocket as the document you described as Exhibit 93? A. Yes, it was.

Mr. Schnacke: I will offer that book in evidence as Government's Exhibit next in order.

Mr. Gladstein: Same objection, Your Honor.

The Court: Overruled. It may be admitted.

(Whereupon the booklet referred to was thereupon received in evidence and marked Government's Exhibit 94.)

Mr. Schnacke: If Your Honor please, I would like to identify these documents to the jury, if I may. Government's Exhibit No. 93, a document that says "Department of Health, [282] Bureau of Records and Statistics, City of New York, Certification of Birth. This is to certify that John Francis Brennan, sex male, was born in the City of New

(Testimony of Frank J. Smith.)

York on April 9th, 1909, according to birth record No. 19453, filed in the Manhattan office of this Bureau on April 21, 1909. In witness whereof, and so forth," and the signature of the registrar and the deputy. Apparently they are appended signatures.

And the text on the reverse recites certain provisions of the administrative code of the City of New York. The matter appearing in the upper right-hand corner of the reverse side was not part of the document at the time it was obtained by this witness.

Government's Exhibit 94 is a book. It contains a stamp, initiation stamp, $100, with a rubber stamp marked over it, "September 1, 1951." It reads, "This is to certify in consideration of initiation fee of $100, duly paid, Local Union No. 697, John F. Brennan, journeyman and worker, No. 470133, is hereby granted membership in the International Association of Bridge, Structural and Ornamental Iron Workers, affiliated with the American Federation of Labor, by Local Union 697 of Roanoke, Virginia. September 1, 1951."

And there are signatures purporting to be the signatures of the president, financial secretary and the address of the secretary. It bears the initials of Mr. Smith in the lower left-hand corner. [283]

Inside are several pages with columns marked for monthly dues, assessments. Under monthly dues it says, "You must have stamp before end of month to receive death benefits." In the last column, "See that you get stamps every time you pay dues and as-

(Testimony of Frank J. Smith.)

sessments. Don't pay unless secretary attaches stamps paid for."

Starting in the middle of the second page there are stamps, monthly dues stamps, which are in green, and death benefit stamps, which are in pink. Those stamps are over-stamped with a rubber stamp. The first two September 10th, 1951, the second stamp is September 10th, 1951, the green stamp. I can read 10/51 on the red stamp there but I can't read the month preceding it.

And then October 10th, 1951, on the next row of stamps, October 10th, 1951 on the next row of stamps, October 1951 on all of the stamps in the first five rows on the second page containing stamps.

May 30th, 1952, and also the date and number is stamped on the bottom row there. Then we find May 31st, 1952 stamps on the top half of the following page. October 24th, 1952 stamps on the bottom stamps on that page.

On the next page we have December 26 stamps imprinted over each of the stamps and on the page following that, containing just four stamps, a December 26th, 1952 stamp.

The balance of the book contains printed matter except [284] for the last page: Date of first initiation, a rubber stamp, September 1, 1951 in local Union No. 697.

Mr. Schnacke: Q. After the conversation about the coat to which you testified, did you conduct any further search of the person of Mr. Thompson or of the cabin at Twain Harte?

(Testimony of Frank J. Smith.)

A. I conducted no search of the cabin at Twain Harte, but I did conduct the search of Thompson's person. I naturally checked him at the time of the arrest, and he had a wallet in his back pocket, in the khaki pants he was wearing, a pen knife, car keys, handkerchief, and that was all he had.

Q. Did you examine the contents of the wallet?

A. Yes, sir, I did.

Q. I will show you a wallet and ask you if you have ever seen that wallet before, and if so when and where?

A. Yes, this is the wallet that I took from Thompson's back pocket.

Q. How do you identify that?

A. At the time I put by initials and date on it. I put it in the corner here (indicating).

Q. I will show you two keys. Can you identify those keys?

A. Yes, these are the keys that I took from Thompson's pocket. There again I put the date and my initials on the keys.

Q. Those keys were found in his pocket?

A. Yes, sir, that is right.

Q. Pants or coat pocket?

A. Pants pocket. [285]

Q. And the pants he was wearing at the time you arrested him?

A. Yes, that is right.

Mr. Schnacke: I will ask that the wallet described by the witness be received in evidence as Government's Exhibit next in order.

(Testimony of Frank J. Smith.)

Mr. Gladstein: Same objection, if Your Honor please.

The Court: Same ruling.

(The wallet referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 95.)

Mr. Schnacke: I will ask that the keys described by the witness be marked for identification at this time.

(The keys referred to above were thereupon marked Government's Exhibit No. 96 for identification only.)

Mr. Schnacke: Q. I will show you certain documents and ask you if you have seen those documents before, and if so when and where?

A. Yes, I have seen these documents before. These are documents that were in the wallet that I took from Thompson's pocket.

Q. They were not enclosed in those cellophane containers, were they?

A. No, they were not.

Mr. Schnacke: I will remove them from these. I will ask the documents described by the witness be received in evidence [286] as Government's exhibit next in order.

Mr. Gladstein: I make the same objection that the search was not authorized, no connection so far as the defendants were concerned, no foundation, incompetent, irrelevant and immaterial.

Mr. Schnacke: We will mark these as a single exhibit in the envelope.

(Testimony of Frank J. Smith.)

The Court: Admitted.

(Whereupon the documents referred to were thereupon received in evidence and marked Government's Exhibit No. 97.)

Mr. Schnacke: Q. Mr. Smith, did you find certain other matter in the wallet of Robert Thompson that we have not introduced in evidence here?

A. Yes, I did. There was a matter of $363, I believe, and some odd cents in the wallet.

Mr. Schnacke: May I describe to the jury generally, the nature of the matter in Government's Exhibit No. 97?

"Rent received, D. and L. Brennan, Apartment 2S6915 Cornell Avenue, Leslie M. Price, Stoney Avenue address, phone DOrchester 3-8000." In the lower right-hand corner it reads, "Chicago, December 6, 1952."

There are three long papers reading at the lower left-hand corner, "American Bridge, Pittsburgh, Pa.," showing hours and earnings, deductions, employee's name, Brennan, John F., [287] the amounts of earnings and hours shown thereafter. There are three of those, each of them bearing the name John F. Brennan.

There is a card of Robbins Export Co., Inc., and written on it it says, "Give bearer whatever part he wants C.O.D." The signature, "Max."

On the reverse it says, "From authority directing 9:00 to 6:00 p.m.—" It looks like "Vet 17," and what appears to be a "D" or an "O," followed by a capital "S" and a small "t," and Mr. Smith's initials.

(Testimony of Frank J. Smith.)

A 1953 membership card of L. Brennan in the America National Red Cross, a contribution $1.00.

A paper name John Brennan, city or town, Chicago, street address, Cook County. The description at the bottom—across the top April 24th, 1952, what appears to be the small letters K.C., the number 47566, and the number X2518917, a dollar sign, the number 1.00 followed by D.A.

And then "Associated Hospital Service, New York's Blue Cross Plan. John Brennan, 149 Vermilyea Avenue, New York City."

An employee courtesy card, Schenley Distillers Corporation. Introducing John Brennan. Firm, W. C. Williams Kirby, address 224 W. 49th Street, bearing apparently the signatures of V. V. King and the name of Mr. Shindler written in the lower left-hand corner.

The Social Security card 09-207-6833 for John Francis Brennan, containing what appears to be a signature, John Francis [288] Brennan.

The Social Security card, Linda Corsia Brennan, and bearing the apparent signature of Linda Corsia Brennan.

An official receipt, International receipt of Bridge, Structural and Ornamental Iron Workers, Local No. 697, September 26th, 1952, received of J. Brennan one—fifty written out, dollars for credit toward September dues. Received by, and a signature.

A social security account, John Francis Brennan, Apartment 41, 149 Vermilyea Avenue, New York, New York, 09-207-6833.

(Testimony of Frank J. Smith.)

A Missouri resident's fishing permit, name J. F. Brennan, address 5307 Pershing, St. Louis, age 44, blond hair, hazel eyes, height 5-11, date issued May 31, 1953, bearing the apparent signature of J. F. Brennan, the apparent signature of E. J. Chambers.

Then a card, a photostatic copy of a document, the top line April 24th, 1952, and a series of other numbers, what appears to be one dollar, and under that; name, John F. Brennan, a code number, 13655, Street, 6915 Cornell, Chicago 49, Cook County. A description, signature John Brennan, the bottom line, then driver's license will expire April 30th, 1955, State of Illinois, Edward J. Barrett, Secretary of State.

Operator's license, 1951, Pennsylvania Department of Revenue, made out to John F. Brennan, Majestic Hotel, Broad Street and Girerd Avenue, Philadelphia, Pennsylvania. [289]

And the Jackson Park Currency Exchange, Incorporated, money order receipt in the amount of $30, dated May 27th, 1952.

Mr. Schnacke: Q. Mr. Smith, did you find on Mr. Thompson's person or in his wallet any material in the name of Robert G. Thompson?

A. No, I did not. There was nothing in his wallet or on his person with the name Robert G. Thompson at all.

Q. Did you have a conversation with Mr. Thompson about his wallet at a later time?

A. Yes, I did.

Q. When and where was that?

(Testimony of Frank J. Smith.)

A. When we were back in the San Francisco office.

Q. Who was present at that time?

A. Special Agent Richardson, Thompson and myself.

Q. What was the nature of that conversation?

Mr. Gladstein: I object to that as hearsay, not binding on any of the defendants, incompetent, irrelevant and immaterial.

The Court: There is one conspiracy charge in which he is named as a co-conspirator.

Mr. Schnacke: Yes, Your Honor.

The Court: The circumstances may permit it. It depends upon the state of the record at the time. I will overrule the objection. If it appears that the Court has committed some grievous error in that, it can later be stricken.

The Witness: What was your question? [290]

(Record read.)

The Witness: A. I attempted——

The Court: Don't say what you attempted to do. Just say what was said.

The Witness: A. I asked Thompson about where he had been and if he knew where the other Communist fugitives were at the present time.

Mr. Gladstein: I am going to move to strike that and renew my objection, if Your Honor please.

The Court: I will deny the motion.

The Witness: A. Thompson would not answer me, but I then went to him—took the wallet out in front of them and started to go through the various

(Testimony of Frank J. Smith.)

material that was in the wallet, and in his presence asked him if it was his, and he said it was his wallet, and these were his papers that were in the wallet. I went over each item in the wallet with him, and I made specific mention of the fact that everything was in the name of John Francis Brennan, and I recall I did ask him who John Francis Brennan was, and he smiled at me and made no comment. He wouldn't tell me who he was. I made a listing of the documents——

The Court: He is going beyond the question.

Mr. Schnacke: Q. That was the end of the conversation? A. Right.

Q. Did you prepare a receipt or a listing of the documents [291] in the wallet?

A. Yes, I did. I prepared—I made a listing of the documents as I reviewed them with him. He would not sign a receipt for those. He made no comment about it. But I also prepared a listing of the money that I took from the wallet, and at first I showed it to him and he agreed it was correct, and at first he wouldn't sign this either. However, just prior to the time that he was taken, to be brought to jail, he said, "Well, I guess you know who I am," and he said, "I will sign it." So in my presence he signed his name, Robert Thompson, and the listing of the money I had taken from him and the wallet and the penknife.

Q. Is this the listing to which you have referred? A. Yes, sir, it is.

(Testimony of Frank J. Smith.)

Q. Does the signature of Robert Thompson appear on that?

A. Yes, it does. It appears directly above mine.

Q. There is some rubber stamp matter in the upper right-hand corner that was not on the document at the time you received it from Mr. Thompson? A. No, sir.

Mr. Schnacke: I will ask that that document be received in evidence as Government's exhibit next in order.

Mr. Gladstein: I object to it as hearsay, incompetent, irrelevant and immaterial, and not binding on any of the defendants, no connection shown, no proper foundation. [292]

The Court: In my opinion the record is in sufficient shape to warrant the introduction of this document at this time as to its admissibility. It may be admitted.

(Whereupon the document referred to was thereupon received in evidence and marked Government's Exhibit No. 98.)

Mr. Schnacke: No further questions, Mr. Smith.

Mr. Gladstein: Does Your Honor want to take the morning recess before I proceed?

The Court: We will take our usual mid-morning recess at this time.

(Recess.) [293]

Cross Examination

Mr. Gladstein: Q: Mr. Smith, what time did

(Testimony of Frank J. Smith.)

you say you went to the house there at Twain Harte? A. 1:05 p.m.

Q. Did you come from San Francisco?

A. Yes, sir, that's right.

Q. When did you leave San Francisco?

A. On September 26th. Pardon me, August 26th.

Q. At what time?

A. I believe it was around four o'clock in the afternoon.

Q. And you went toward Twain Harte?

A. Pardon?

Q. And went up toward Twain Harte?

A. Yes, that is right.

Q. When did you arrive at Twain Harte?

A. I believe it was around 9:30.

Q. At night? A. Yes.

Q. Did you go to the house at all before 1:05 next day? A. No, sir, I didn't.

Q. Were you alone or with others?

A. Pardon?

Q. Were you alone or with others?

A. I was with various other agents.

Q. Was Mr. McCann with you at any time?

A. Yes, sir, he was.

Q. During what period was he with you?

A. You mean immediately prior——

Q. To the arrest.

A. ——to the arrest?

Q. That day or next day.

A. Agent McCann was with me on the 26th, and

(Testimony of Frank J. Smith.)

immediately prior to the arrest on the 27th—or at the time of the arrest, I should say, on the 27th.

Q. That is James McCann?

A. No, Joseph. Joseph Patrick.

Q. There are two McCanns who were there?

A. No. The McCann I was speaking of is Joseph McCann.

Q. Is that the—I may have the first name wrong. Is that Joseph McCann that testified here? I was wrong. I am told his first name is Joseph and he has already testified in this case. You might not know that. A. Yes.

Q. Was Mr. McCann with you during the early morning hours of the 27th, say, any time between daybreak and one o'clock in the afternoon?

A. Not in the early morning hours. He was with me at the time of the arrests at 1:05.

Q. Did you have the house under surveillance at any point before 1:05? [295]

A. I did not.

Q. Or the occupants of the house?

A. I did not.

Q. When you talked with Thompson, did you have a warrant for his arrest?

A. I did not have a warrant with me at the time. I advised him there was a warrant——

Q. No—— A. ——outstanding.

Q. I just asked if you had one. You didn't have one? A. I did not have it with me.

Q. Did you ever have a warrant for his arrest?

(Testimony of Frank J. Smith.)

A. There is a warrant outstanding for Thompson.

Q. No, I asked you if you ever had a warrant for his arrest.

The Court: He means you personally, in your possession.

A. I personally did not have it in my possession.

Mr. Gladstein: Q. Did you ever have it in your possession? A. No, sir.

Q. What?

A. I never had it in my possession, no.

Q. When did you leave New York to come here to Twain Harte?

Mr. Schnacke: Oh, if Your Honor please, I think that is going back much too far. I object to that as being immaterial and not within the scope of the direct examination.

Mr. Gladstein: I think it is within the proper scope of [296] cross examination. How far back it goes I can't know.

The Court: Well, that is a little too far back. Anything that reasonably bears on the factual matters that the witness has testified to is within the bounds of cross examination, but when the man left New York—oh, it might be possible the Court might allow it in its discretion if it appeared there was some question whether the man was ever here, or something of that kind, the testimony whether he left New York——

Mr. Gladstein: That is the purpose.

(Testimony of Frank J. Smith.)

The Court: But I think it is too far afield. Sustain the objection.

Q. Mr. Gladstein: Is it a fact you came from New York for the purpose of participating in the arrest of Thompson?

Mr. Schnacke: I object to that as being immaterial. The state of mind of the witness, his purpose in coming to Twain Harte, isn't material.

Mr. Gladstein: It isn't a question of the state of mind. Question of his instructions, not state of mind. What he was coming here to do.

The Court: I don't think it makes any difference what his purpose was.

Mr. Gladstein: Q. At the time you were at Twain Harte on the 27th of August, although you were there and had come from San Francisco the day before, you were still attached to the New York office of the Bureau, is that correct? [297]

A. Yes, sir, that is right.

Q. Did you personally have any difficulty in recognizing Thompson when you saw him?

A. I beg your pardon?

Q. Did you personally have any difficulty in recognizing Thompson when you saw him?

A. I personally did not because I had seen him on several hundred occasions, but his changed identity was very noticeable. As I say, I personally did not, although there was quite a change. If I hadn't seen him on so many occasions I probably would not have identified him.

(Testimony of Frank J. Smith.)

Mr. Gladstein: That is all. Oh, just a moment.

The Court: Anything else?

Mr. Schnacke: Is that all, Mr. Gladstein?

Mr. Gladstein: Just a second. I am constrained to ask Your Honor's indulgence to ask another question.

Q. Will you tell us when you received instructions to participate in the arrest of Thompson?

Mr. Schnacke: I object to that as being immaterial.

The Court: I will sustain the objection.

Mr. Gladstein: That is all.

Mr. Schnacke: Thank you, Mr. Smith. That is all.

(Witness excused.)

Mr. Schnacke: Mr. Ground. [298]

ALBERT B. GROUND

called as a witness on behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name for the Court and jury.

A. Albert B. Ground—G-r-o-u-n-d.

Direct Examination

Mr. Schnacke: Q. Where do you reside, Mr. Ground?

A. 7411 Maple Avenue, Takoma Park, Maryland, a suburb of Washington, D. C.

(Testimony of Albert B. Ground.)

Q. By whom are you employed?

A. Federal Bureau of Investigation.

Q. What is the nature of your employment?

A. I am a fingerprint examiner. I classify, file, search and identify finger prints.

Q. For how long have you been so employed?

A. Thirty years.

Q. How many years? A. Thirty.

Q. Thirty? During the course of that time approximately how many fingerprints have you examined and classified?

A. Approximately 5,000,000.

Q. How many fingerprints are there in the files of the Federal Bureau of Investigation with which you work? A. Over 130,000,000. [299]

Q. And you have worked with fingerprints during the entire 30 years to which you have referred, is that right? A. Yes, sir.

Q. What is an inked fingerprint?

A. Inked fingerprint is the recording of the ridge formation of the bulb of the finger.

Q. And what is a latent fingerprint?

A. A latent fingerprint is one that is left at the scene of a crime, usually not discernible to the naked eye.

Mr. Gladstein: I am going to ask that that be stricken on the ground a portion of it is the conclusion and opinion of the witness.

The Court: Well——

Mr. Gladstein: Not a proper definition of a latent fingerprint.

(Testimony of Albert B. Ground.)

The Court: "At the scene of the crime", that may go out. I take it you mean a print left any place where a finger meets an object?

A. Yes, sir. The ridge formation leaves perspiration any place you touch. I have left my impressions on the microphone.

Mr. Schnacke: Q. Mr. Ground, I will show you Government's Exhibit No. 78 and ask you if you have ever seen that before? A. I have.

Q. And I will show you Government's Exhibit 92, which is ten Budweiser beer cans and ask if you have ever seen those [300] before?

A. I have.

Q. Are there inked fingerprints on Government's Exhibit 84?

A. That is this (indicating)?

Q. Yes. A. Yes, sir.

Q. And did you examine the beer cans in Government's Exhibit 92 to determine if there were latent fingerprints on that? A. I did.

Q. And did you find latent fingerprints on each of those cans?

Mr. Gladstein: Excuse me, I didn't hear the question.

The Court: "Did you find latent fingerprints on each of those cans?"

The Witness: I did.

Mr. Schnacke: Q. And did you compare the latent fingerprints found on the beer cans with the inked fingerprints found on the card, Government's Exhibit 84?

(Testimony of Albert B. Ground.)

Mr. Gladstein: One moment, sir. Objected to on the ground no proper foundation has been laid. We haven't had the witness tell us when and where and the circumstances under which this examination was made.

Mr. Schnacke: I asked if comparisons were made, and I will proceed after that to develop when and where they were made. Wouldn't that be the proper order?

The Witness: A. I did. [301]

Mr. Schnacke: Q. Where did you make that examination?

A. In my office at the Federal Bureau of Investigation, Washington, D. C.

Q. And do you recall when that was?

A. I received the cans on September 21st, 1953, and they were made within the following several days.

Q. You don't recall the exact date on which you made that comparison? A. No, sir.

Q. But it was some time within a period of a few days? A. Four or five days.

Q. Now, in making the comparison of the inked fingerprints and the latent fingerprints to which you have referred, what did you do?

A. I compared them—first, I photographed the latent impressions on the cans and from the photographs made my comparison with the inked fingerprints on the fingerprint card by using the fingerprint glass and comparing each fingerprint on the card with the latent impression on the can.

(Testimony of Albert B. Ground.)

Q. Did you find a fingerprint on any of the beer cans in Government's Exhibit 92 that corresponded to any of the fingerprints on the card, Government's Exhibit 84?

Mr. Schnacke: I beg your pardon, do I have the wrong exhibit number?

The Court: You are using the wrong one. You said 78 at [302] first.

Mr. Schnacke: It is Government's Exhibit No. 78.

The Witness: 78?

Mr. Schnacke: May the record show where I have previously spoken of Exhibit No. 84, which I think I have, I intended to say Exhibit 78.

The Court: Refer to it by name, too, and then there won't be any confusion.

Mr. Schnacke: Q. It is the fingerprint card of Shirley Kremen.

The Witness: A. That is correct. One latent fingerprint on can No. 4 was identified with the right thumb impression of Shirley Kremen. And one other latent impression on can No. 4 was identified as the left thumb print of Shirley Kremen.

One latent fingerprint on can No. 5 was identified as the right thumb impression of Shirley Kremen.

One latent fingerprint on can No. 6 was identified as the left thumb impression of Shirley Kremen.

Those are all that were identified as the fingerprints of Shirley Kremen.

Q. Would you hand me the cans on which you

(Testimony of Albert B. Ground.)

found fingerprints identical with the prints on the fingerprint card of Shirley Kremen?

Mr. Gladstein: I think that last question is assuming something not in evidence. The witness said he "identified". [303] Counsel said something about "identical".

Mr. Schnacke: I will withdraw that and use the phrase, that corresponded to the fingerprints of Shirley Kremen as they appeared on her card.

Mr. Gladstein: I think it would be better if Mr. Schnacke used the testimony rather than trying to change it.

The Witness: A. Here they are. This one, also.

Mr. Schnacke: Q. You have handed me three cans. Are those cans marked in any way so that you can identify them?

A. They have numbers on them, number 4, 5, and 6.

Q. And who put those numbers on there?

A. I put those numbers on there.

Q. That was after you received them in Washington, D. C.? A. Yes.

Q. The number to which you refer was put on the cellophane wrapping, is that correct?

A. That is correct, on the outside.

Q. Who wrapped those cans?

A. I did.

Q. When you received the cans, in what condition were they?

A. They didn't have the cellophane wrapping on the outside, I put the cellophane wrapping there.

(Testimony of Albert B. Ground.)

Q. Did they have the scotch tape?

A. Yes, the latent impressions were covered with scotch tape.

Mr. Gladstein: Well, I am going to object to that and move [304] that be stricken.

The Court: What?

Mr. Gladstein: About the latent impressions were covered by tape. He was asked whether the tape was present and he may say so.

The Court: Read the question and answer.

(Question and answer read by the reporter.)

The Court: I will deny the motion.

Mr. Schnacke: These cans are all in evidence, Your Honor, under one exhibit number, but I think with the marks on the can testified to by this witness it is unnecessary to designate them any further in the record other than to refer to the numbers that appear on the cellophane wrappers.

Mr. Schnacke: Q. Mr. Ground, have you ever seen fingerprints made by different people that were the same? A. No, sir.

Q. That is, in the examination of all the fingerprints you testified you have looked at in your career?

A. Not unless they were made by the same finger.

Q. And did you arrive at a conclusion as to the latent prints that you saw on these cans that are numbered 4, 5 and 6, and the prints that you observed on Shirley Kremen's fingerprint card?

A. Yes, sir. As I testified——

(Testimony of Albert B. Ground.)

Q. What was that conclusion? [305]

A. One fingerprint on can No. 4 was identified as the right thumb print. One other fingerprint on can No. 4 was identified as the left thumb print.

Q. By "identified" do you mean was identical with those prints as they appear on the fingerprint card?

A. Impressions, the impression on the cans and the impression on the fingerprint card.

One latent fingerprint on can No. 5 was identified as the right thumb print of Shirley Kremen.

One fingerprint on can No. 6 was identified as the right thumb print of Shirley Kremen. I beg your pardon, it is the left thumb print. The last one is the left thumb print.

Q. Mr. Ground, I will show you Government's Exhibit 81, which is the fingerprint card of Robert Thompson, and ask you if you made a comparison between the fingerprints appearing on that card and the latent fingerprints on any of the beer cans?

A. I did.

Q. And what did that comparison disclose to you?

A. One of the impressions appearing on can No. 5 was identified as the right ring fingerprint of Robert Thompson.

One fingerprint on can No. 6 was identified as the left ring fingerprint of Robert Thompson.

One latent fingerprint on can No. 10 was identified as the left little fingerprint of Robert Thompson.

(Testimony of Albert B. Ground.)

And three latent fingerprints on can No. 12 was identified, [306] one with the right middle, one with the right ring, and one with the left middle finger impression of Robert Thompson.

Mr. Gladstein: May I have that answer again?

Mr. Schnacke: Would you read it back?

(Answer read by the reporter.)

Mr. Schnacke: Q. When you say "was identified with", do you mean was identical to?

A. They were made by the same finger. The same finger made the impression on the fingerprint card as made the impression on the beer can.

Q. Did you find any other comparisons, or is that all of them with respect to Robert Thompson?

A. That is all with respect to Robert Thompson.

Q. I show you Government's Exhibit 84, the fingerprint card of Sidney Steinberg, and ask you if you made the same comparison of fingerprints on that card? A. I did.

Q. With the beer cans? A. I did.

Q. And what was the result of that comparison?

A. One latent fingerprint on can No. 8 was identified as the right index finger impression of Sidney Steinberg.

Two latent fingerprints on can No. 9 were identified as the finger impressions of Sidney Steinberg, one the right index, one the right middle finger impression. [307]

Q. And when you say "was identified with", that has the same meaning as the phrase had as you used it heretofore?

(Testimony of Albert B. Ground.)

A. That is correct. The same fingers made both impressions.

Q. Now, I will show you Government's Exhibit 80, the fingerprint card of Samuel Irving Coleman, and ask you if you made the same type of comparison with respect to the prints on that card?

A. I did.

Q. And what did that comparison disclose?

A. One latent finger impression on—I beg your pardon. Two latent finger impressions on can No. 3 were identified as the left thumb print of Samuel Coleman.

Q. And I will show you Government's Exhibit 79, the fingerprint card of Carl Ross, and ask you if you made the same type of comparison with respect to this one? A. I did.

Q. And what did that comparison disclose?

A. One latent fingerprint on can No. 11 was identified as the right middle fingerprint of Carl Ross.

One latent fingerprint on Budweiser can No. 8 was identified as the right index fingerprint of Carl Ross.

One additional latent impression on can No. 8 was identified as the right middle finger impression of Carl Ross.

Q. And I will show you Government's Exhibit 85, being the fingerprint card of the defendant Patricia Blau, and ask you if [308] you made the same comparison with respect to the fingerprints on that card? A. I did.

(Testimony of Albert B. Ground.)

Q. What did that comparison disclose?

A. One latent fingerprint on Budweiser can No. 7 was identified as the right index fingerprint of Patricia Blau.

Mr. Gladstein: Right what?

A. Index finger.

Mr. Schnacke: Q. And in each case where you said "were identified with", you mean that the same finger that made the impression on the card is the finger that made the impression on the beer can, is that correct? A. Yes, sir.

Q. Now, Mr. Ground, are you prepared to demonstrate how you made the comparison of the fingerprints on the *cars* and the fingerprints on the cans? A. Yes, sir.

Q. Did you photograph the fingerprints on the can? A. I did.

Q. And did you photograph the fingerprints on the card? A. I did.

Q. And did you put those photographs together in some fashion so that they could be compared, one with the other?

A. I made a chart, enlargement of one of each of those identifications, to illustrate the manner in which we arrived [309] at a conclusion as to the identity of those impressions.

Mr. Schnacke: With the permission of the Court, may the witness explain to the jury how he made one comparison for each of the defendants in this case?

(Testimony of Albert B. Ground.)

(Thereupon the witness left the stand and took a position before the jury box.)

The Witness: A. (Displaying exhibit to the jury). The finger impression on the left is the inked, or enlargement of the inked finger impression on the fingerprint card for Samuel Coleman.

The latent impression on the right is one of the finger impressions appearing on can No. 3. There is also a comparison set out here, and the points of similarity are described, a line drawn from each characteristics — ending ridges, bifurcations, short ridges, and islands or enclosures considered as means of identity or comparison between one impression and another.

The points of similarity, you will see, are in exactly the same place on the latent impression enlargement as on the inked enlargement. Same general area, same spot, and the same distance. Same number of ridges between each and every point of similarity.

Point No. 1 on chart C, which is the inked impression of the left thumb print of Samuel Coleman, shows an ending ridge ending up here in the northwest corner of the chart. Immediately next to that, one ridge intervening, is point 12—next to each other. I have shown the ridge of point 1 to the right, and [310] drop down three ridges, the ridge running to the left stops at that point.

Same thing on the other side on this chart. Point 1, ending ridge, goes over, point 12. Follow

(Testimony of Albert B. Ground.)

the ridge up this point 1, 2, 3 ridges down and find a point 1.

Immediately to the right of that, another ending ridge going to the left is point 3. Same thing occurs in both charts. Following down to the center of the chart, a ridge going to the left and stopping immediately above the center where you will find an ending ridge going left.

Same thing occurs in both charts. Just to the right a bifurcation going down. A bifurcation is a fork-like, like a fork in a road.

One ridge running down, opening into two ridges. That occurs at this point. Same thing, identical, occurs in the exact place on chart C.

To the right, one, two ridges over, is another ending ridge going upward. Just one ridge intervening. Downward from point 5, point 6, and across to point 7—one, two, three ridges intervening. That is a downward bifurcation.

And over to the left is a short ridge from the center of the pattern, coming down to the right, breaks down and drops at that point or stops. Same thing occurs in this chart. Comes down and stops.

Another two end ridges haven't been shown. They are [311] additional points of similarity that appear on each chart. To the left of the center and down in this manner, connecting at No. 9, which is an ending ridge, downward to the left of center in the pattern area.

Over to the left we find similar bifurcations or branches going downward to the left. It is point 10.

(Testimony of Albert B. Ground.)

Just above that there is another ridge over to the left, is point 11. Ending ridge going downward, appearing in exactly the same place on both charts.

I say in exactly the same place. There is an allowance must be made that that may be, oh, a quarter—one eighth or a quarter inch off, but in exactly the same spot. That is due to the photography and the curvature of the can. When you photograph around the edge of the can it brings it over over to the right, then when it is flattened out it is a little off to one side, maybe a quarter inch. However, the characteristics are exactly the same place and the same number of ridges between each and every characteristic. [312]

Mr. Schnacke: May the two photographs which the witness has referred to be marked Government's exhibit next in order?

Mr. Gladstein: Is that for identification?

Mr. Schnacke: In evidence.

Mr. Gladstein: I do not think the proper foundation has been laid for the reception in evidence. They were used for illustrative purposes. I think they should properly be identified. I want to object to their being received in evidence.

Mr. Schnacke: The fingerprints are in evidence and these are photographs of the fingerprints.

The Court: They are explanatory of the witness' testimony. They may be admitted.

(The photographs referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 99.)

(Testimony of Albert B. Ground.)

Mr. Schnacke: Q. You have handed me two more photographs. Will you tell me what these photographs represent?

A. Those are enlargements I believe of Sidney Steinberg's. It is marked on the outside.

Q. The photograph on the right is what?

A. On the right is the latent impression on can No. 9, one of the latent impressions on can No. 9.

Q. On the left is what?

A. On the left is the right index fingerprint of Sidney [313] Steinberg, an enlargement of the right index fingerprint of Sidney Steinberg, on the fingerprint card of Sidney Steinberg.

Mr. Schnacke: I will offer those two photographs in evidence as Government's Exhibit next in order.

The Court: Admitted.

Mr. Leonard: I make the same objection to this new offer as Mr. Gladstein made to the last one. I think it is preferable that the exhibit be in evidence prior to the time the witness explained it to the jury rather than putting it in afterwards.

The Court: Well, can't you shorten the testimony?

Mr. Schnacke: Suppose we put each of these in. We will allow the jury to look at them, and I will ask the witness to explain only one more of the photographs.

Mr. Gladstein: I am going to object to putting them in evidence. No proper foundation has been laid, and I will object to them severally and in

(Testimony of Albert B. Ground.)

quantity, if, as I understand, they are going to be offered in quantity.

Moreover, if I may say so, if the Court please, this kind of testimony is opinion and conclusion testimony, and I want to make the objection that the witness has not been qualified by the testimony here today with a proper foundation to give his opinion and conclusion. If Your Honor overrules that objection I ask that the jury be instructed that this [314] is opinion testimony rather than fact testimony.

The Court: I do not know what distinction I can make to the jury in that regard. Probably 100 times I have heard fingerprint testimony presented in courts before a jury. I do not know how differently to do it. Of course it is opinion testimony. It is not necessary to put the detail in. The witness has given his opinion and explained how he did it. You seem to want to put the details in. It is always open for cross examination, of course.

Mark all of them for identification so you will have them in, and then you may proceed to ask what further questions you wish.

(The photographs referred to were thereupon marked Government's Exhibit No. 100 for identification.)

Mr. Schnacke: Q. What are the next photographs you are handing me, sir?

A. The chart marked K and L are enlargements of right middle finger impression of Thompson and one of the latent impressions on can No. 12.

(Testimony of Albert B. Ground.)

Mr. Schnacke: I will ask that the photographs just identified by the witness be marked Government's Exhibit next in order for identification.

(The photographs referred to were thereupon marked Government's Exhibit No. 101 for [315] identification.)

The Witness: The next chart is chart E and F. E is number 3 fingerprint impression, the right middle finger impression of Carl Ross, and one of the latent impressions on can No. 8.

Mr. Schnacke: I will ask that that group be marked Government's Exhibit next in order for identification.

Mr. Gladstein: I do not like to interrupt the tempo, Your Honor, but I did not get a chance to look at them. Counsel has advised me he does not have copies of them.

The Court: They are only being marked for identification now.

(The photographs referred to were thereupon marked Government's Exhibit No. 102 for identification.)

The Witness: Exhibit G and H, Exhibit I and J is an enlargement of the right thumbprint of Shirley Kremen, and one of the latent impressions on can No. 5.

Mr. Schnacke: I will ask that that be marked for identification as Government's next in order.

(Thereupon group of photographs referred to above were marked Government's Exhibit No. 103 for identification.)

(Testimony of Albert B. Ground.)

The Witness: Exhibits G and H are, or rather enlargements G and H, G is an enlargement of the right index finger [316] impression of Patricia Blau and the latent impression on can No. 7.

Mr. Schnacke: I will ask that the Patricia Blau prints be marked for identification with the Government's number next in order.

(Thereupon group of photographs referred to was marked Government's Exhibit No. 104 for identification.)

Mr. Schnacke: I would like, if Your Honor please, to have the witness explain the similarities in the last one as a further example of his method of comparison.

Q. Will you explain to the ladies and gentlemen of the jury the items of similarity that you discovered on those?

The Court: To what is he referring? You said the last one but you did not identify it.

Mr. Schnacke: I am referring to the photographs of fingerprints of Patricia Blau, Government's Exhibit No. 104.

The Witness: Chart G is an enlargement of the right index finger impression appearing on the fingerprint chart of Patricia Blau. H is an enlargement of the latent impression appearing on can No. 7. The similarity or the same points of similarity appear as your ending ridges, bifurcations, short ridges and enclosures or islands.

Point No. 1 is an ending ridge going up at this point right here (indicating), and drops down to

(Testimony of Albert B. Ground.)

Point 12 again, [317] because it is immediately adjacent to Point No. 1. It is to the right, down just a little.

The same thing occurs on Chart No. H, which is the latent impression No. 1 and No. 12. The ridges go upward and ending, one adjacent to the other.

Going over from Point No. 1 to the right, another ending ridge is Point No. 2, one, two, three, four ridges over, ending going forward.

Point No. 3, down to the right, the next ridge over, is Point No. 3, the very next ridge over.

And then one ridge inside and to the right, Point No. 4, those are all ending ridges going to the left and stopping right where the point is marked.

Point No. 5, two ridges down from Point No. 4, two ridges, the ridge going down to the right—rather than upward, it is going downward. The same thing occurs on Chart G as on Chart H. Down to the left, the ridge coming downward.

Point No. 6, four ridges over, on each chart, Point No. 6. To the left, one, two, ridges, there is a triangular formation at the delta—known to the fingerprint men as a delta formation, taken from the Greek letter "D"—a triangle right here. That is Point 7.

Point 8, Point 9, three parts of the triangle, the same thing occurs on Chart H as on Chart G. [319]

To the right is Point 10, a bifurcation coming downward just to the left of that. One ridge over is Point No. 11.

Point No. 12 I have already explained, which is

(Testimony of Albert B. Ground.)

two ridges over from Point No. 11. All points are in a similar location on each chart.

Q. Will you tell me, sir, how many points of identity are necessary to establish the identity of fingerprints?

Mr. Gladstein: That calls for a conclusion, if Your Honor please, what is necessary.

The Court: He is testifying as an expert, an opinion witness. Overruled.

A. That would depend upon the impressions themselves. I would have to see the impression to determine how many points of similarity. Certain characteristics appear in impressions. Sometimes there are more in one than in another. We may take a square inch of one impression, that is, of one finger. You may find 12 or 15 points of similarity or points of identity in that square inch. On another fingerprint impression you may not find but two or three in that same area. So it would depend upon the type of characteristics, how many appear in a certain area, but as a standard we have set out 12. Some of the older technicians, who were pioneers in fingerprinting had established years ago that 12 were a sufficient number. Some say 6, some say 10, 9, and so forth. But we arrive at the opinion that 12 would [320] be satisfactory, 12 points of similarity with no dissimilarities which cannot be explained.

Q. Did you find 12 points of similarities on each of the fingerprint comparisons to which you testified?

(Testimony of Albert B. Ground.)

A. There are more than 12 points of similarity on each of the impressions which has been testified to.

Mr. Gladstein: I move to strike the last portion, if Your Honor please. He was asked if he found 12. The answer would be yes or no.

The Court: Overruled.

Mr. Schnacke: Q. Did you find any unexplained points of dissimilarity in any comparisons that you made? A. No, sir.

Mr. Schnacke: No further questions.

The Court: I think we perhaps should take the noon recess now.

Members of the jury, no doubt some members of the jury and perhaps other parties interested in this case may wish to engage in some observance of Good Friday tomorrow, and so when we assemble tomorrow, we will assemble at the usual time, 10 o'clock in the morning, but at 11:30 we will take a recess until 3 o'clock so as to give those who are so inclined an opportunity to engage in Good Friday observance.

We will reconvene now at 2 o'clock this afternoon.

(Thereupon a recess was taken to the hour of 2 o'clock p.m. this date.) [321]

ALBERT B. GROUND

resumed the stand, previously sworn.

Cross Examination

Mr. Gladstein: Q. Mr. Ground, I believe you said that you examined some 5,000,000 fingerprints during the course of your 30 years in this business.

A. Yes, sir.

Q. And I suppose it is on that experience that you have told this jury that fingerprints of two different people are never exactly the same?

A. That is correct.

Q. Every person has fingerprints that, in one respect or another, differ from the fingerprints of some other person? A. That is right.

Q. At the same time, there are points or degrees of similarity between the fingerprints of myself and yourself, perhaps, isn't that so?

A. Yes, sir.

Q. What would you say, based on your experience, would be the possible number of points of similarity that might be found, say, in the index finger of my right hand, print of that, and yours?

A. The number of points of similarity? [322]

Q. Yes.

A. The characteristics used, there are only four characteristics used as I stated heretofore, end ridges, bifercations, short ridges and enclosures or islands. Those may appear, but they won't appear in exactly the same place.

Q. But my question was this: Any finger—my finger—let's take that as an example—would have

(Testimony of Albert B. Ground.)

ending ridges that would print just as yours would?

A. Correct.

Q. And would have bifurgations as well as yours? A. Yes.

Q. It would show short ridges, too, wouldn't it?

A. Yes.

Q. And it would show these, what you call islands, isn't that right? A. Yes, sir.

Q. If you and I were, simply as a matter of experiment, to have a print taken, based on your experience how many points of similarity would it be possible for you to find between my print and yours?

A. I have no idea how many could possibly. I would have to see them.

Q. I beg your pardon?

A. I would have to see them together to determine, but I wouldn't have any idea how many possibilities. According to [323] the writers and the —some of the individuals who have written textbooks on fingerprints, the possibility of two fingerprints being the same is 1 followed by 60 digits. The number of characteristics.

Q. Yes, the number of characteristics, similarities.

A. There are only four possible characteristics. How many times they would appear between your finger and mine is impossible for me to determine without looking at both.

Q. Well, Mr. Ground, I realize that I don't have anything specific, but I am asking you, based on

(Testimony of Albert B. Ground.)

your own experience, isn't it so that you have found points of similarity—points of similarity between the fingerprints of different people?

A. Oh, yes.

Q. Yes. I am asking you now whether you can't give us some general idea—I am not asking about the similarity between your print and mine now as a matter of fact, but simply for the purpose of illustration, how many points of similarity do you think would be possible, and give us a range, to find between a print of mine and a print of yours taken from the same finger, the right index finger.

A. Oh, there may be several points of similarity.

Q. But how many?

A. But in addition there will be several points of dissimilarity.

Q. I will come to that in a moment. First, I am asking you [324] about points of similarity. Could there be as many as 20 or 30?

A. Oh, no, sir. Maybe two or three. Possibly two or three. Even four, possibly. In a general way it could be four.

Q. Not more than four?

A. Oh, there could be more than four. I wouldn't be able to say without examining the impressions.

Q. Could be as many as eleven points of similarity between your fingerprints and mine, couldn't there?

(Testimony of Albert B. Ground.)

A. Not without any dissimilarity there. Not in my experience.

Q. You have told us you as a rule look for twelve points of similarity, didn't you?

A. Yes, sir. That is standard. That doesn't necessarily mean there has to be twelve points of similarity in order to be made by the same person.

Q. Oh, no.

A. That would depend on the number of characteristics in the given area.

Q. When you talk about—. Let's take this. You understand, I am not a fingerprint expert, so if——

A. (Interposing) I am trying to help.

Q. I know you are, and you will help me more if you will go along with me and take it in one, two, three, simple ABC fashion, because this isn't a field in which I claim to be an expert. [325]

All I am trying to ask you now, if I put my finger here I will leave a print of some kind, won't I? A. Yes.

Q. And if you put the corresponding finger on your right hand—this happens to be the right index—you would leave a print?

A. Yes.

Q. Then if you photographed the two of those and enlarged it considerably so that you could examine them, probably under some microscope, you would find points of similarity between those prints, wouldn't you?

A. Yes, sir, possibly. Possibly. May not be.

(Testimony of Albert B. Ground.)

Q. Well, might the one or even two completely different types of fingerprints. But possibly there could be similarities? A. Yes, sir.

Q. And I am asking you now if it isn't so you might find as many as ten or eleven points of similarity between your print and my print?

A. I don't believe I would find eleven.

Q. Might find ten?

A. Possibly ten. Maybe eleven. Maybe even eleven points of similarity.

Q. And when you talk about points of similarity, would you try to tell us in a way we can clearly understand what you mean by a point of similarity? [326]

A. The characteristics, as I stated before, ending ridges in exactly the same place on both impressions. There will be, just like this street is named Jones Street here and the next is named Market Street, in order to be the same street, they would have to be in the same place on the map. That is the same thing with fingerprints. Same lines going a certain length and stop.

Q. That is the ending ridge?

A. That is the ending ridge, that is right. Could bifercate or diverge or converge at certain points. They separate. One ridge separate into two.

Q. Yes?

A. And that is what is known as bifurcation.

Q. All right.

A. Another point of similarity. Those will ap-

(Testimony of Albert B. Ground.)

pear exactly in the same place in each impression.

Q. And the short ridge is what?

A. Just like it says, a short ridge. Like a street that runs a block and no further.

Q. In other words, you find in the area that you are examining a line or ridge that seems to be short, isn't connected with some other line in the immediate vicinity? A. That is correct.

Q. And an island, what is that?

A. That is just an enclosure. It is one ridge that separates [327] into two, then converges again or joins together and makes an island or enclosure.

Q. The term you have used today, "point of similarity", have you used it to indicate any one or more of these four things, that is, ending ridge, bifercation, short ridge and island?

A. Yes, sir.

Q. So that when you look at prints, it is correct, isn't it, that you just don't look to see whether the ending ridges seem to be the same, but you look for all four, don't you? A. Correct.

Q. And so I take it from your answer, the answer you gave us a while ago when you said you didn't think you would find eleven points of similarity between, not necessarily my prints, but two sets of prints, two different people, but you might find ten, those different points of similarity would include such things as the ending ridges, bifercations, the short ridges and islands?

A. Yes, sir.

VOL.

II

Vol. II

TRANSCRIPT OF RECORD

(Pages 489 to 994)

Supreme Court of the United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN AND SIDNEY STEINBERG, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 14, 1956

CERTIORARI GRANTED OCTOBER 8, 1956

No. 14359

United States
Court of Appeals
for the Ninth Circuit

SHIRLEY KREMEN, CARL ROSS, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 469 to 941, inclusive)

Appeals from the United States District Court for the Northern District of California, Southern Division

(Testimony of Albert B. Ground.)

Q. Now, you mentioned points of dissimilarity, remember? A. Yes, sir.

Q. I started to ask you something and you added something about dissimilarities, and I said I would get to that, remember? A. Yes.

Q. That refers to things you see in two sets of prints different from each other, correct? [328]

A. Correct.

Q. Based on your experience, if I were to put my fingers down there and you were to put yours alongside of it, no matter how many points of similarity there might be between the two, you are bound to find some points of dissimilarity?

A. Definitely.

Q. And those points of dissimilarity would show themselves also in precisely those four characteristics you have mentioned, that is, the end ridges, the bifercations, the short ridges and islands, isn't that right? A. Yes, sir.

Q. They would either occupy, one or more of them, a different position in the print, different relationship to some other point they started from?

A. That is correct.

Q. It is also true, isn't it, that if I put my finger here, leaving a print—. By the way, that is based on the fact that there is a certain amount of oil exuded from the pores through the skin, isn't it?

A. Yes, sir.

Q. And there is some wax or dust on the surface of the table that is impressed by it, is that right? A. Not necessarily, no, sir.

(Testimony of Albert B. Ground.)

Q. Well, press it hard enough, it will be?

A. Wouldn't have to be any dust there, no. It would be recorded there without anything. [329]

Q. It would be recorded, dust or no dust? All right. Then by means of putting some dusting powder, or powder of some kind, the difference in height of the ridges, that is, the valleys and the mountains, will be recorded, in effect, isn't that right?

A. Yes, sir. The dusting powder adheres to the moisture that is left.

Q. That is it. The moisture that I leave, how does that record itself on the surface of this table?

A. Through the sweat pores from the ridges of the fingers. The sweat pores run along the ridges of the fingers. They exude perspiration and a line, as the sweat runs along, goes in ridge formation.

Q. So an area, then, that I have called the valley, you don't get the sweat exuding?

A. That is correct.

Q. So that—. By the way, they call it exudation, don't they? A. Yes.

Q. So that the exudation will show a print or impression that indicates a ridge?

A. Correct.

Q. Now, if I put my fingerprint on this table, now, and then let's say either today or some other day, or under some other different conditions, put my fingerprint either on the same [330] table or some different object, you may find points of dissimilarity between those two prints, may you not?

(Testimony of Albert B. Ground.)

A. The same fingers?

Q. Yes.

A. On two different articles?

Q. Yes.

A. Well, it is possible, depending on how much impression is recorded. You may have one side of the fingers at one time and another side of the fingers at another time and there would be points of dissimilarity.

Q. Is it not a fact or in your experience, Mr. Ground, that you tell us about, that when the fact is that the same man puts his finger down on an object on two different occasions it will record prints that have factors of dissimilarity between them? A. Never heard of it.

Q. I beg your pardon?

A. Never heard of it.

Q. Never heard of it?

A. No, sir. Not two recordings of the same impression. The same area being dissimilar? No, sir.

Q. I shouldn't say the same area. What do you mean by the same area? Maybe I misspoke myself.

A. Place his fingers in this manner, just touching an object like this (demonstrating). Touch an object like this, you will [331] leave exactly the same impression.

Q. Well, let's put it this way: Suppose—you are an expert on this subject—you were to take my fingerprints. As I understand it, you would take my fingers and put them down on an inked surface of some kind, or some kind of card of some

(Testimony of Albert B. Ground.)

kind, and roll it around in that manner (demonstrating), wouldn't you? A. Yes, sir.

Q. Now, suppose you took that kind of print, if you took them on an inked surface and compared them with the prints I left on the table by just putting my fingers down the way I just did, you would find points of dissimilarity, wouldn't you? A. No, sir.

Q. None?

A. No, sir, I don't think so.

Q. Do you remember this morning when Mr. Schnacke asked you if you found points of dissimilarity, all of which, however, you could explain? Do you remember that question?

A. I think the statement was that I could find no points of dissimilarity which could not be explained.

Q. Which could not be explained?

A. Yes.

Q. Then you found points of dissimilarity?

A. The dissimilarity I had reference to might be dirt or dust or something of that nature, or another impression over an area, [332] portion of the impression. That is, one finger overlapping another, something of that nature, but not the impression itself.

Q. In other words, you were referring, for instance, among other things, to the possibility that if I put my fingers on that table and you came along and put your fingers either on or almost on

(Testimony of Albert B. Ground.)

a portion of it, that that would develop points of dissimilarity? A. Correct.

Q. And the same thing might happen with—what did you say? Dirt?

A. Dirt, dust, or any foreign matter. Even could be on the fingers at one time and would not be on the fingers the second time.

Q. That's right. In other words, if the physical circumstances under which the print is laid down on two different occasions differ, you are going to get differences?

A. That is possible, yes, sir.

Q. By the way, does the weather element enter into this in any manner?

A. Not into the identification, no, sir.

Q. I beg your pardon?

A. Not into the identification of the impressions, no, sir.

Q. Well, does that enter into it in the sense that they tend to wear down or efface at different tempos portions of the [333] ridge or portion of the print?

A. You mean a latent print being left, for instance, here on the inside of the building?

Q. Yes, sir.

A. Or on the outside of the building?

Q. Yes.

A. Would the weather condition effect whether a print would be left more discernible at one time than another?

Q. Yes. A. Oh, yes, yes.

(Testimony of Albert B. Ground.)

Q. And in the examination by photograph and microscope, that would show up more points of dissimilarity, wouldn't it?

A. No, sir, I don't think so.

Q. You would call it points of dissimilarity that you could explain? That is what you mean, isn't it?

A. No, I don't believe so, unless there might be dust collected possibly on the impression. That might be, that might be recorded in the lifting of latent impression of dusting of the latent impression.

Q. What was that you said about lifting a latent impression?

A. Removing of the impression from the object. In this particular case there has nothing been removed from the object.

Q. What could happen when you take them?

A. Might be dust or something adhered to the latent impression. Might be even brush marks on the latent impression. [334]

Q. And what could happen when you remove it, when you lift it?

A. The portion of it may not be lifted. May be dust, and so possibly something that was—that looks like a ridge.

Q. I see.

A. But actually it isn't a ridge at all but additional foreign matter that doesn't belong to the first.

Q. So it is possible the presence or absence of

(Testimony of Albert B. Ground.)

dust might tend in the photographic reproduction to show a ridge where it really wasn't, is that it?

A. Yes, sir, that is so.

Q. And then it is possible, is it, that that ridge might be counted a point either of similarity or dissimilarity when it wouldn't be a valid factor, isn't that so?

A. That is quite so, yes, sir.

Q. Mr. Ground, I understood you to say that there are 130,000,000 prints?

A. More than 130,000,000 fingerprints on file. Sets of fingerprints on file in the Federal Bureau of Investigation.

Q. You mean by that the fingerprints of more than 130,000,000 different people?

A. No, sir. There may be two or more sets of one person.

Q. I see. I see. But it would run into millions, is that right?

A. Millions, yes, sir. [335]

Q. These are all inked fingerprints, aren't they?

A. Yes, sir.

Q. And they are the kind that we have seen here? A. Yes, sir.

Q. And this is what you called—. In contradistinction to a latent fingerprint, this is one which is recorded by the use of ink in the first place?

A. Yes, sir.

Q. Whereas a vacant one is sort of sleeping there? You don't see it unless——

(Testimony of Albert B. Ground.)

A. That is right. It wouldn't be discernible to the naked eye, usually.

Q. You say a latent fingerprint can be lifted?

A. Yes.

Q. Tell us how you go about lifting that fingerprint.

A. Oh, it can be lifted in two different ways: By use of a rubber stamp or by use of a cellulose tape.

Q. Cellulose or rubber? Would you be good enough, Mr. Ground, to tell us just how you go about lifting a fingerprint from, oh, any object on which you find it? That is, a latent one?

A. First a latent——

Mr. Schnacke: (Interposing) Your Honor please, I am going to make an inquiry here and then make an objection, I think. It was my understanding from this witness none of the prints involved here had been lifted. Mr. Gladstein may be [336] under a misapprehension on that point, and, if so, possibly he doesn't want to follow this line of inquiry. If none have been lifted, I suggest this inquiry is immaterial.

Mr. Gladstein: I don't understand the point of the objection, Your Honor.

The Court: I suppose he wants to object on the ground it is immaterial and beyond the direct examination.

Mr. Schnacke: Unless we have some prints that were lifted in this case, I don't see that this is within the scope of the direct examination or material.

(Testimony of Albert B. Ground.)

Mr. Gladstein: Well, let's see. I will withdraw the question temporarily.

Mr. Gladstein: Q. When did you say you received these cans for your examination?

A. On September 21st. September 21st, 1953.

Q. That is the first time in your life you ever saw them? A. Yes.

Q. You don't know where they were, under whose custody, or what happened to them prior to that time? A. No, sir.

Q. And you were asked simply to make, in the usual routine of your work, to make an examination and report and analysis of what you found on those cans? A. Yes, sir.

Q. When you received those cans were they in some cellulose or cellophane material? If you remember? [337]

A. They were wrapped up. Actually, there were 21 cans when I received them. There were 21 cans.

Q. 21? From whom did you get them?

A. They were received in the regular course of mail with a covering letter from the San Francisco office.

Q. Were they all empty cans?

A. Yes, sir.

Q. Were they all Budweiser cans?

A. Yes, sir.

Q. Were you asked to examine all 21?

A. Yes, sir.

Q. What did you do with the 21 after you finished examining them?

(Testimony of Albert B. Ground.)

A. The ones which we have here, ones which had latent fingerprints which were identifiable, were returned to the San Francisco office.

Q. And that is 10 of them, altogether, isn't it?

A. 10 of them, yes.

Q. And the others——

A. Were disposed of.

Q. The other 11 that were sent you just threw away? A. Yes.

Q. Because, if I understand you right, Mr. Ground, either they didn't have any fingerprints on them or, if they had fingerprints, the fingerprints were recorded so poorly that [338] despite your expert scientific technique you couldn't really get enough off the beer can to enable you to say whose fingerprints it was?

A. That is absolutely correct. Regardless of whether you would find anybody's, you couldn't identify them as anybody's prints.

Q. Were all these cans in one batch?

A. All in a box, yes, sir.

Q. When they came to you did they refer to some particular case? A. Yes, sir.

Q. Which case?

A. I think it was titled AFCOM.

Q. AFCOM? That is some code?

A. That is a code word.

Q. I am not asking you to divulge that, but really all I am asking you is to tell us whether the covering letter or information given you was to the

(Testimony of Albert B. Ground.)

general effect that those 12 cans had to do with this case? A. Yes, sir.

Q. Were you informed where they came from?

A. No, sir.

Q. Or when they were obtained?

A. No, sir.

Q. Was there anyway of knowing when any of these prints were [339] first placed on the cans?

A. No, sir.

Q. Was there any way of knowing how or in what manner any of these prints got on any of these cans? A. No, sir.

Q. When you first received the cans, then, they weren't in cellophane of any kind. Did they have anything on them?

A. Oh, yes, they were covered over just as they are at the present time, with the exception of this outside cover. Notice here there is scotch-tape.

Q. Yes.

A. That scotch-tape covering, that is just as I received it, with the scotch-tape on it. I put this covering on.

Q. You say now—if you will excuse me, you say "This" and "This" and we understand it——

A. I beg your pardon.

Q. That is all right, Mr. Ground. I am not criticizing you at all, but for the purpose of the record you are saying that the scotch-tape that is found on the cans now was on the cans when they first came to you in Washington, D. C.?

A. Yes, sir.

(Testimony of Albert B. Ground.)

Q. And that the pieces of cellophane, which have a width equal to it not more than the height of the can, were put on by you? A. Yes, sir.

Q. Was that true, pieces of scotch-tape on each of the cans? [340]

A. That is right, on each can.

Q. Well, I am asking you about the cans that came to you. A. Yes, sir, all the cans.

Q. All the 21? A. Yes.

Q. Were there any markings of any kind either on the cellophane, the width or scrap of cellophane on each of these cans, or the cans themselves at that time when you first got them?

A. I believe they were all initialed. Other than that there was no mark on them.

Q. You made no special observation of that?

A. No, sir.

Q. Am I correct that the pieces of cellophane you found on the various cans you took to mean somebody had previously had occasion to have these cans or examine them, dust them, or done something to them intended to indicate to you that there were fingerprints there? A. Yes, sir.

Q. And that is what you were looking for?

A. Yes, sir.

Q. And that is what you were looking for?

A. Yes, sir.

Q. Am I right in saying you then took the cans and placed some mark on each of them from 1 to 21? [341]

(Testimony of Albert B. Ground.)

A. No, sir. From—I marked the cans from 3 to 12.

Q. 24?

A. 3 to 12. These particular cans.

Q. No, no, I don't mean that. I mean the 21 cans you received.

A. No, I only marked these.

Q. You didn't mark them at the outset?

A. Well, actually I didn't mark the cans. I marked on the outside of the cellophane wrapper that you find on the cans.

Q. Yes, in the interest of accuracy. You had 21 cans, then? A. Yes, sir.

Q. You didn't place any marks on them?

A. On the cans? No, sir.

Q. Or any cellophane wrapper on them?

A. Only on these.

Q. Well, let me ask you this: When did you put the cellophane wrapper on?

A. After I examined the cans for the presence of latent impressions and determined which ones were of value.

Q. Is No. 3 can, marked by you as No. 3, the third can that you examined?

A. Not necessarily, no, sir.

Q. Now, Mr. Ground, there has been received here as exhibits some blown-up photographs. On one side, as you have pointed out to the jury, there is an enlarged photograph of a print [342] that you took on one or another of these cans?

A. Yes, sir.

(Testimony of Albert B. Ground.)

Q. And on the other is an enlargement of a print coming from one or another of these cards?

A. Yes, sir.

Q. Are these the very cards, the ones that are here, either for identification or in evidence, that you had? A. Yes, sir.

Q. They were sent to you? A. Yes, sir.

Q. Along with the——

A. With the exception of one.

Q. What?

A. With the exception of one.

Q. Which one wasn't sent?

A. Mr. Thompson's.

Q. That wasn't sent to you? A. No, sir.

Q. The other five were? A. Yes, sir.

Q. In other words, just before I pass to another point, you didn't have occasion to use at all, then, in your examination, Exhibit 81, the one involving Thompson, is that right?

A. No, sir. This was examined here.

Q. In San Francisco? [343] A. Yes.

Q. Oh, you mean you examined it here in San Francisco? A. Yes.

Q. Oh. So you made some of your examinations here, then?

A. That particular fingerprint card here.

Q. Then that was at a different time than you have been telling us about this morning?

A. No, sir. I don't think I told you anything different this morning.

Q. No, no, I don't say you told us anything dif-

(Testimony of Albert B. Ground.)

ferent. I had the impression from you that you got these cans and these cards in Washington, D. C., and that you went ahead and made your analysis there. A. I did.

Q. I had the impression—I take it erroneously—that all six of these things were done by you in Washington, D. C., but it now appears it wasn't so, is that it?

A. This one particular fingerprint card was not examined in Washington. The one on top.

Q. You examined that one in San Francisco?

A. Yes.

Q. When?

A. Yesterday. Day before yesterday and yesterday.

Q. Up to that time you had not examined these cans for any fingerprints? [344] A. Oh, yes.

Q. I mean the Thompson? A. Yes, sir.

Q. You had? A. Yes, sir.

Q. But in reference to some other card, is that it? A. Yes, sir.

Q. I see. And at the same time that you told us about this morning, in Washington?

A. Yes, sir.

Q. Then yesterday or the day before yesterday you reexamined this card of Thompson's, is that it?

A. Yesterday morning, yes, sir.

Q. Now, I am interested in my examination from now on particularly in your testimony concerning one and only one of these fingerprints, and that is the one that refers to—that you say you

(Testimony of Albert B. Ground.)

found of Patricia Blau on a can I think you marked No. 7, is that right?

A. I believe it is No. 7, yes, sir.

Q. Will you check so that we can be very accurate about this, please, Mr. Ground?

A. Yes, Can No. 7.

Q. Will you take that can and hold it for a moment if it will help you?

A. Yes, sir. [345]

Q. I am going to ask you to go for a moment to —to look at Plaintiff's Exhibit 104, and is that the exhibit that contains on the one side a photographic enlargement of one or a portion of one of the prints of Patricia Blau as recorded on Exhibit 85, and on the other side an enlargement of a photograph you took from Can No. 7.

A. That is correct, sir.

Q. If you want these back for any answer, just be sure to ask me.

Now, so that there will be no question about it, the one here on the left—that is, the left as I am looking at it, as one faces it, which is marked "G," that is a photographic enlargement of a portion of one of her recorded prints?

A. Right index finger, yes, sir.

Q. And the other on the opposite side, which is "H," is supposed to represent a photographic enlargement of a portion of a print taken from Can No. 7? A. Yes, sir. [346]

Q. And letter H, that is supposed to be the pho-

(Testimony of Albert B. Ground.)

tographic enlargement of a latent print, is that right? A. Yes, sir.

Q. Is there any way by which you can tell the jury the extent to which—and I am again referring to this one only, Exhibit 104—the extent to which the photography has been enlarged?

A. Ten times, approximately ten times.

Q. Ten times?

A. A trifle over, a trifle less, but about ten times its natural size.

Q. Is that standard?

A. Usually, yes, sir. Most of those are ten times.

Q. Most of those? A. Yes.

Q. Is there a reason why you enlarge to the extent of ten times rather than twenty?

A. No, sir, ten times you can get very nicely into a briefcase. At twenty times it is a little harder to carry around.

Q. Five times would not be enough?

A. Would not be sufficient to see it properly.

Q. Ten times is about right?

A. About average, yes.

Q. In other words, the enlargement at ten times the original or to enable you to see just about as clearly as it is humanly possible points of similarity and dissimilarity? [347] A. Yes, sir.

Q. Can you tell us what the actual area is that this exhibit refers to, represents I mean in actual life? A. The area of the finger?

Q. Yes.

(Testimony of Albert B. Ground.)

A. It is about from the center to the left of the finger impression, from the very center beyond the left side of the impression, not very much of the right side there. All the latent impressions that appear on the can are there, and only that portion that is referred to in the inked impression is present in that enlargement.

Q. So that the one that is H, that side, is the entire photograph?

A. It is the entire latent impression as it appears on the can.

Q. And a good portion of that does not seem to contain much of an impression, does it?

A. I don't understand you.

Q. This here in the upper right hand corner (indicating).

A. That is just blurred. It has powder adhered to it; probably taken at three or four times and the powder is all over. It doesn't show any ridge formation.

Q. How did you go about determining which portion of the fingers print taken from the recorded print to photograph, or did you photograph it all?

A. Oh, yes, I blocked the entire latent impression. All the latent impression, I blocked that out on the negative, squared it up, and then used the same portion, the same area on the ink impression for the enlargement G.

Q. Unless my eyes deceive me, and again I apologize to you if I ask a question that sounds like

(Testimony of Albert B. Ground.)

that of an amateur because I don't know, but it looks to me that the one on the side that is marked G has—I do not know the technical term—does not seem to be the same size or to represent the same area as the one on the side marked H, am I wrong about that? A. I think it does.

Q. You think it does? A. Yes, sir.

Q. You mean, in other words, both G and H are intended to, and do, as I understand your testimony, cover precisely the same physical space and area? A. Yes, sir.

Q. Now, Mr. Schnacke a while ago made some statement about fingerprints being lifted. Will you tell us about that, Mr. Ground, how fingerprints are lifted?

The Court: How is that germane to the cross examination? I suppose there is a vast field of expertising in the fingerprint field. I do not want the jury to sit here listening to that. They may take weeks.

Mr. Gladstein: I will withdraw that question.

Q. When you received those cans they all had scotch tape on them? A. Yes, sir.

Q. When you went to the job of photographing them, you removed the scotch tape, didn't you?

A. No, sir.

Q. You photographed it——

A. Right through the scotch tape.

Q. Right through the scotch tape?

A. Yes, sir.

Q. The prints could have gotten on that can,

(Testimony of Albert B. Ground.)

any of those cans, before the piece of cellophane or scotch tape, rather, was placed on them in one of two different ways, couldn't they?

A. I suppose so, yes, sir.

Q. What are the two different ways?

A. I don't know what you have reference to. By handling the can.

Q. That is one way. What is the other way?

A. I don't know of any other way. It would have to be done by handling the can at some time or other.

Q. Fingerprints can be transferred from one object to another, can't they, sir?

A. Yes, it is possible.

Q. And it has happened, hasn't it?

A. Yes, I guess it has happened. [350]

Q. And you, Mr. Ground, I assume, are thoroughly familiar with the expert literature in this field over these years, aren't you?

A. I believe I have read most publications in connection with fingerprints, yes, sir.

Q. You are probably familiar with everything that has been written in the magazine on the subject called "Fingerprints"? A. Yes.

Q. You read that, and you read the police magazine and the detective magazine?

A. On fingerprints, yes.

Q. I mean on that, and you probably have read books on the subject? A. Yes, sir.

Q. And you are familiar with Mr. Vollmer, his writings, the former chief of police at Berkeley,

(Testimony of Albert B. Ground.)

who used to be president of the National Association of Criminologists, or whatever the title was?

A. Yes.

Q. And many other books on the subject?

A. Yes.

Q. And you know, don't you, that it is possible, it has been done, it has even happened to Chief of Police Vollmer himself that he placed a fingerprint on an object there, another fellow came along, and he lifted that fingerprint and transferred it [351] on to another object, isn't that right?

A. I don't know anything about that case, no, sir.

Q. Did you ever hear or read about that?

A. Things could happen out here on the West Coast that we do not pay much attention to in the East, and vice versa, I would say.

Q. Without regard to that particular case, though, you do know that it is true, that it has happened that a fingerprint on a can has been lifted from one object to another?

A. Yes, sir, it has been done.

Q. And that would mean, in other words, wouldn't it, Mr. Ground, candidly, that I could put my thumb print on this table, and then if a person knew how to do it, he could take and lift and transfer that thumb print and put it on, let us say, one of these cans of beer, isn't that right?

A. Could be done, but it is hard to do. It could be done.

(Testimony of Albert B. Ground.)

Q. It would have to be done by somebody who knew how?

A. I have done it myself, actually, removed my own fingerprint and put it somewhere else.

Q. That being so, when you testified today that the same finger whose print was on Mrs. Blau's card made the fingerprint on the can itself, all you meant, sir, was that the print you found on can 7 bore the twelve points of similarity to the print on her card, to make you feel that whether she personally did it or whether by a process of transference, it seemed to [352] be her print, isn't that right?

A. It is her print. Yes, sir, in my opinion it is her print.

Q. But you are not saying she put it on the can, are you? A. No, sir.

Mr. Gladstein: I have no further questions.

The Court: Is that all, counsel?

Redirect Examination

Mr. Schnacke: Q. Mr. Ground, you have mentioned on occasion, after hearing of this print transfer business that Mr. Gladstein appears to be familiar with, that you had tried to do that with your own print, is that right? A. Yes, sir.

Q. After making such a transfer are there evidences of that transfer that are apparent to an expert?

A. Yes, sir, we have tried it among ourselves, and in each and every case we have been able to

(Testimony of Albert B. Ground.)

determine whether it was a falsified impression or a true impression. It would show to some degree the material—all of the material would not be listed. In other words, there would be possibly a portion of the impression left or, when it is placed on the second time, it would be on the list, but after it is placed on the object, all the powder or whatever the case may be would not be placed on the other object. In other words, you lose some of it sufficiently so that it may be questionable as to whether [353] it was the original specimen or not.

Q. Did you observe any of those evidences of a lifted fingerprint on the Patricia Blau print?

A. No, sir.

Mr. Schnacke: That is all.

Recross Examination

Mr. Gladstein: Q. Mr. Ground, I am sorry, I have to keep you a few minutes later. In a lifted fingerprint that has been transferred, of course, it remains basically the same. It is the same person's fingerprint. But it loses what the experts call a certain sharpness of delineation, life or warmth, is that right? A. Yes, sir.

Q. Looking at one that says Mr. Thompson's, you would say that that shows what? Normal delineation, sharpness of delineation, life, and warmth? A. I think so, yes.

Q. It shows some evidence, as a matter of fact, right there that it is a can on which that print is, doesn't it?

(Testimony of Albert B. Ground.)

A. That is to a degree, yes, sir. There are a couple of lines in here.

Q. In other words, the print was on some portion? A. The background is there.

Q. Would you say the same thing about the one involving Carl [354] Ross, that that shows adequate sharpness, warmth and life?

A. Yes, sir.

Q. And, of course, that is a can in the background, doesn't it?

A. Yes, it is a can in the background.

Q. The same thing is true, I suppose, about Mr. Coleman's exhibit, which I now hand you; that has a sharpness of delineation, a vitality, life or warmth? A. Yes, sir.

Q. Also evidence that it was on the can. There is internal evidence, some marking, it says "logger" on there. You find the same thing on Mrs. Kremen's here, do you? A. Yes, sir.

Q. I am now showing you Steinberg's. Is that sharp, alive, and warm as the experts call it?

A. This is mediocre.

Q. Mediocre? A. Yes, sir.

Q. The one that involves Mrs. Blau, that is pretty blurry, isn't it?

A. No, I don't think so, any more than any of the others. If you take the edge of the others, for instance, on Steinberg, and compare this one, the same area, the same condition exists here, also on this side, and here actually there is no ridge formation at all (indicating). [355]

(Testimony of Albert B. Ground.)

Q. Yes, but you found a number of prints of Steinberg on one or another of these cans, you told us, didn't you?

A. Steinberg, three, I believe.

Q. And you found a number of prints for Thompson, Mrs. Kremen, and so on, didn't you?

A. Thompson, six, I believe.

Q. And the only print regarding Mrs. Blau that you told us about is one print on one can?

A. Yes, sir.

Q. And there is no other print on that can, is there, that you have told us about?

A. No, sir.

Q. That print, Mrs. Blau's, you have marked twelve different things on each side. What are the twelve points of similarity there?

The Court: Is this re-cross or another cross examination? If you want to open it up again, you may be permitted to do so, but then the other side will go back on it and we will be here for another two hours. Each of the lawyers will think of something else again. If you want to reopen the cross-examination you may have permission to do so, but I want the record to show that. It is not recross examination.

Mr. Gladstein: I will ask Your Honor's permission.

The Witness: All of these characteristics have been pointed out to the jury. This is one of the charts used in [356] pointing out the characteristics.

(Testimony of Albert B. Ground.)

Mr. Gladstein: Q. That is true, but I have not asked about it, and I will ask Your Honor's leave if you will indulge me to examine him on it, even though, strictly speaking, it is not cross examination.

What are the twelve—and go slowly so we can get it. What is the first point of similarity?

A. The first point of similarity is that ending ridge going upward, and then just down to the right of that, on the inside, there is also an ending ridge. That is point No. 12. One and 12 are right next to each other. That is the first point. The [illegible] I call the jury's attention to that is the fact that they are right adjacent to each other.

Q. Let me ask you about that. Do you mean that point 1, the point that you have marked 1, on each of those bares similarity to themselves without regard to No. 12, or are you telling us that if you examined point No. 1 on G and point No. 12 on G, and the distance and relationship to each other, and if you examine the corresponding points No. 1 and 12 on H, that you find a point of similarity?

A. That is correct.

Q. The latter? A. That is right.

Q. Then you are using No. 1 and No. 12 to tell us about one point of similarity?

A. Two points of similarity. [357]

Q. What are the two points of similarity?

A. Both of them ending ridges, adjacent to each other, upward ending ridges with one edge intervening, one right here and one next to it, what is an

(Testimony of Albert B. Ground.)

ending ridge. The same thing occurs here. One ends right there and No. 12 right next to it.

Q. I am not going to question you about that. I can't see two. I wouldn't know if I could see it, Mr. Ground. What I want to know is whether, when you use 1 and 12, you are telling us about one or two points of similarity.

A. Two points of similarity.

Q. That is what you intended to tell us about in each case? A. Yes, sir.

Q. Now, about this process of transference, isn't it a fact that—oh, by the way, before I ask you that, looking at this print of Mrs. Blau's, there isn't anything internally on those photographs that would indicate that they were on a can, is there?

A. Not in the area shown in the chart, no, sir. However, I have a photograph of more of the area.

Q. I understand that. That is, of the can?

A. Of the can, with this impression included.

Q. Mr. Ground, just a few questions: Isn't it a fact that for many years the technique has been known, a technique and a process known to leaders, people who occupy positions [358] such as you do, in the identification profession, of how to—not forge but transfer a person's fingerprints from one object to another, and that this technique or practice is purposely and understandably not revealed to the public because it might be used by criminals and add to the difficulties of law enforcement officers, isn't that true?

A. That is pretty hard for me to answer. I do

(Testimony of Albert B. Ground.)

not believe I can answer that and say yes, because I do not think generally that it is so. I think only on one occasion in my 30 years have I ever tried to transfer fingerprints, and I did that to see whether it could be done.

Q. You could and did?

A. I did, yes. My fellow co-workers could determine that it was a transfer in that particular case.

Q. Did they know——

A. They didn't know it was being done, no, sir.

The Court: Q. Did you ever read about any of these things in detective stories?

A. Yes, sir.

Q. I have, too. I was wondering if that is what they are talking about. A. Yes, sir.

Mr. Gladstein: I didn't hear Your Honor's question.

The Court: I asked the question if he ever read about any of these things in detective stories. I told him I had, [359] too.

Mr. Gladstein: It is not just detective stories.

Q. Did you ever hear of B. C. Bridges?

A. Yes, sir.

Q. Was he an internationally recognized expert in identification?

A. He wrote a book on fingerprints.

Q. Was he a recognized expert?

A. I do not think that in my opinion he is the expert that I am in fingerprints. I think I have had more experience than any other man in the world on fingerprints, and I am not trying to pat myself on

(Testimony of Albert B. Ground.)

the back. I worked at fingerprints and nothing else but fingerprints for 30 years. Bridges had all kinds of subjects — ballistics, everything, handwriting. Mine has only been fingerprints for 30 years.

Q. Did you read Mr. Bridges' book?

A. Yes, sir.

Q. Do you remember where he said, "Common sense will understand that fingerprints can be copied"? A. Yes, sir.

Q. Did you ever hear of Harold L. Frankel?

A. Yes, sir.

Q. Is he a fingerprint expert? Not the same, let us say, that you are, sir, but an expert?

A. I wouldn't want to say anything about him. I don't [360] know.

Q. Did you ever hear of William B. Mills, superintendent of the Bureau of Police of Philadelphia? A. Yes, sir.

Q. And of course, you have heard of Mr. Vollmer. By the way, when you read the book of Mr. Bridges did you notice that Mr. Vollmer wrote an introduction to it?

A. Yes, sir, I believe he did.

Q. Mr. Frankel, you know he wrote a book that had an introduction and a recommendation by the superintendent of the Bureau of Police of Philadelphia. Are you familiar with that book?

A. I am not familiar with it but I read it.

Q. Then I will ask you if it is not true that at page 76 of a volume called "Fingerprint Expert" by Harold L. Frankel you find this:

(Testimony of Albert B. Ground.)

"By a process of etching on metal a fingerprint can be placed on a surface which the person whose finger it is never touched. Dr. Hertzog in his book 'Medical Jurisprudence' cites a case wherein one was convicted of a crime. The only evidence as to his identity being a fingerprint which was later proved to have been 'forged' or 'planted' at the scene of the crime by the detective who made the 'discovery' of the latent. It should [361] be remembered that to 'forge' a fingerprint, a genuine finger impression is required, and that it is impossible to 'forge' one without such genuine impression."

Are you familiar with that portion?

A. Yes, sir.

Q. Do you know about the case in Pennsylvania where it was found that exactly that thing happened to a person?

A. No, I don't know about the case. I would like to say something about the situation.

Q. Yes?

A. That particular case right there.

Q. Yes. A. It was forged into a can.

Q. I beg your pardon?

A. It was forged into a can. May I ask you to read that again, please, the statement?

Q. Yes, I will show you the passage. You read it to yourself if you want, Mr. Ground.

A. The part I have is "etched" into the can.

Q. Etched?

A. That is by use of acids. It is etched into the

(Testimony of Albert B. Ground.)

can. But first you have to have the fingerprints of the individuals you want to put on there.

Q. Oh, yes. If I was in San Jose, just by way of example, [362] or in my office, and I wanted a fingerprint on that can or anything else, I could put it on the wheel of my car, my wallet or my hat?

A. Yes.

Q. And you could by process of transference lift that, transfer it, and put it on a beer can, couldn't you?

A. You would have to have the original latent impression removed and etch it into the can. These impressions on a can are not etched into the can. They are powdered, and powder would not have any adherence whatsoever as that etched appearance in the can, such as portrayed in the statement.

Q. Is acid the only method of etching?

A. No, sir, powder could be transferred.

Q. If you are good enough, and I am assuming you would be——

A. But you would have to get the powdered impression from the individual and transfer it from one place to another.

Q. Yes. If you were fingerprinting me, or if you knew that I had just touched this table, you could take my actual print on the table, and through the use of powder, not acid, get it transferred to a beer can, couldn't you?

A. It is possible, yes.

Mr. Gladstein: That is all.

The Court: Q. Let me ask you one question on

(Testimony of Albert B. Ground.)

the Court's own motion. Is there any evidence in your examination of [363] these cans that anybody faked the prints in any way on these cans?

A. No, sir.

Mr. Gladstein: If Your Honor——

The Court: Did you want to ask something else?

Mr. Gladstein: No, I will withdraw what I was going to say.

The Court: Have you finished with the witness?

Mr. Schnacke: May I ask one question?

Mr. Gladstein: I think we had better take the recess, because in view of Your Honor's question I would like to ask the witness a few others.

The Court: Go ahead and ask him now.

Mr. Gladstein: Q. You say there was no evidence that it was faked? A. No, sir.

Q. What is the evidence of faking that exists in these cases?

A. As a matter of fact, I did not examine to determine if there was any evidence of faking of fingerprints in this case. These were developed by the Federal Bureau of Investigation. I would have no occasion to determine whether it was faked.

Q. Very well. So your answer to the Judge's question is you really did not make any test to see whether they were faked or not, but you assumed in good faith an honest thing was handed to you. [364]

A. I had no reason to examine them for that purpose.

Q. But you do not know what happened to any of these cans between August 27th and September

(Testimony of Albert B. Ground.)

2nd, before the Federal Bureau of Investigation took hold of them and brought them here to San Francisco, where they came from or by whom they were touched, do you?

A. Not prior to September 1st I do not know what happened to them.

Mr. Gladstein: Thank you very much.

The Court: Anything else?

Mr. Schnacke: Q. Mr. Ground, in any event, you did not forge the fingerprints?

A. No, sir.

Mr. Gladstein: Just one thing.

Q. You did not think by the questions I asked any such question as this was raised, did you, Mr. Ground? A. No, sir.

Mr. Schnacke: Well, what kind of question were you raising?

The Court: Let us not argue about it.

Mr. Schnacke: That is all.

(Witness excused.)

The Court: We will take the afternoon recess at this time.

(Short recess.) [365]

Mr. Schnacke: John Lautner, please.

JOHN LAUTNER

was called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. My name is John Lautner. That is spelled L-a-u-t-n-e-r.

Direct Examination

Mr. Schnacke: Q. Mr. Lautner, what is your present occupation?

A. I am a consultant with the Department of Justice.

Q. Prior to January of 1950 what was your occupation?

A. I was a functionary of the Communist Party.

Q. For how long had you been so employed?

Mr. Leonard: That is objected to, if Your Honor please, on the ground incompetent, irrelevant and immaterial. It has no relation to any issue of this case.

The Court: Well, that is hard for me to say yet.

Mr. Leonard: I heard the prosecutor in his opening statement, and the Court tell the jury, that had no connection to the issues of the case, and I make an objection at this time so that I am not deemed to have waived it. [366]

The Court: I can't rule on evidence until it is submitted.

Mr. Leonard: I will submit the objection.

The Court: I will reserve ruling, as the Court

(Testimony of John Lautner.)

always does have power to change the ruling if it appears there is something that would come into the case that isn't material. What was the last question?

(Question read by the Reporter.)

The Court: What are you talking about now?

Mr. Schnacke: Q. Prior to January of 1950 how long had the witness been employed as a functionary of the Communist Party?

A. For approximately 20 years, except a period of time when I was in the Army.

Q. Starting with January of 1950 what was your specific function in the Communist Party?

A. At that time I was——

Mr. Gladstein: I am going to object to that, incompetent, irrelevant and immaterial, if Your Honor please. The prior questions might have gone to identify the witness, but as to his functions, there is no foundation and there is no materiality.

The Court: Well, of course counsel can't put in all the evidence in one instant of time.

Mr. Gladstein: I appreciate that. [367]

The Court: Maybe it has some relation. Maybe his work has some relationship to the events.

Mr. Gladstein: That should be established first.

The Court: I don't know how you can do that. I will overrule the objection.

The Witness: A. At the time in January 1950, I was head of the New York State Review Commission of the Communist Party, and the security officer for the New York State Organization of the

(Testimony of John Lautner.)

Communist Party, and a member of the National Review Commission of the Communist Party.

Mr. Schnacke: Q. What is the Review Commission?

A. The Review Commission is the disciplines commission of the Communist Party. It's function is to see to it——

Mr. Gladstein: (interposing) Oh, I am going to object to that, if Your Honor please, details of the function of the Review Commission.

Mr. Schnacke: I think it explains it.

The Court: Counsel, are you going to establish some relationship of this witness to the parties in the case?

Mr. Schnacke: Yes, I am.

Mr. Gladstein: Well, nevertheless I object that there is no proper foundation and it is incompetent, irrelevant and immaterial, if the Court please.

Mr. Schnacke: May I withdraw the last question, and I will proceed? [368]

Mr. Schnacke: Q. Mr. Lautner, are you acquainted with any of the defendants in this case?

A. Yes.

Q. Which of the defendants are you acquainted with?

A. Carl Ross, Sam Coleman and Sid Stein.

Q. Do you recognize any of the other defendants, either of the ladies? A. No.

Q. And where did you know Sid Steinberg, Carl Ross and Sam Coleman?

(Testimony of John Lautner.)

Mr. Gladstein: May I have that broken down individually? The answer may vary.

The Court: I am sorry, I didn't hear you.

Mr. Gladstein: May I have those treated individually because the answer may be vague and ambignous?

The Court: All right.

Mr. Schnacke: Q. All right, where did you know Sid Steinberg?

A. In New York City.

Q. And in what particular area in New York City?

A. Well, I knew him as the district organizer of the Communist Party of New Jersey, and——

Mr. Gladstein: Q. I am going to object to that —just a second—and move that it be stricken. The witness was asked in what area he knew him, and now he is stating [369] something about offices.

The Court: It isn't responsive. See if you can't make your questions a little more specific and maybe we will save these objections.

Mr. Schnacke: I will try to do that, Your Honor.

Mr. Schnacke: Q. Did you know where in New York—Do you know what period—or during what period did you know Sid Steinberg in New York?

A. From 1948 up to the time I left the Communist Party.

Q. And you left the Communist Party what year?

A. On the 17th of January, 1950.

Q. And from 1948 until the early part of 1950

(Testimony of John Lautner.)

do you know where Mr. Steinberg's office was in New York?

Mr. Leonard: I object to that on the ground it is incompetent, irrelevant and immaterial. The indictment here charges conspiracy in August 1953. This witness said he knew Mr. Steinberg between 1948 and 1950. I submit it is immaterial.

I submit also, Your Honor, in view of the last volunteer answer of the witness, it is going to be and is highly prejudicial, and I want to submit that the prejudice will not be cured by a subsequent motion to strike. I am prepared to submit authorities to Your Honor on that point. The prejudice is occurring right now.

Mr. Schnacke: Would Your Honor care to hear me on that [370] point?

The Court: I am just looking at the indictment. Do you have something to say in that regard?

Mr. Schnacke: I do have this to say in supplement of the opening statement that I made that the issue of the Communist Party is an issue in this case. It is tied up in this case to provide and to show the motivation of the individuals to show the basis of the conspiracy, to tie each of the defendants to the crime with which they are charged.

Their relationship to the Communist Party will be proven by this witness. That is, the relationship as to those of defendants of which he has spoken. This witness will establish the major step leading to the proof of conspiracy involving these defendants, and I think it is clearly material, not for the

(Testimony of John Lautner.)

purpose of showing them as members of the Communist Party, or any prejudicial purposes, but merely showing them as belonging to the Party to establish why and how they did the things with which they are charged.

Mr. Leonard: If Your Honor please, I would like to say briefly that we submit that in the light of the indictment and in the light of the opening statement the question asked is immaterial and our objection should be sustained.

But in view of the statement made by counsel in open court, in the presence of the jury, a moment ago, I make a motion to move for mistrial on the ground that counsel has [371] stated that the issue of the Communist Party is an issue in this case. It was stated to the jury in his opening statement, and the record will bear me out, and stated by Your Honor that that is not an issue in the case, and counsel has injected it into the case to prejudice the defendants.

Mr. Schnacke: The record will not bear you out in that.

Mr. Leonard: We are at a disadvantage. We don't have a record. We have only our notes.

The Court: I think both of you are speaking a little bit loosely, if I may say so, in referring to some matter as an issue of the Communist Party. I specifically told the jury that the defendants were on trial only on the charge as set forth in the indictment.

Counsel is not injecting any issue of the Com-

(Testimony of John Lautner.)

munist Party. He says that the evidence he wishes to present shows the basis for the alleged conspiracy in the complaint; and if they were members of the South of Market Street Boys, or even the Republican Party, the testimony might be proper in connection with matters of motives that go to make up the purpose and intent of the charged conspiracy. That is all that has been stated.

Mr. Leonard: Your Honor, I would like, Your Honor, to pass our objection to the question and, in view of counsel's statement, press our motion for mistrial.

In support of the latter motion I would like to cite three [372] cases to the Court for the Court's consideration: United States against Sanson, 206 Fed. 2nd 86, with approval in our Circuit in Schino against the United States. 206 Fed. 2nd 67, and U. S. against O'Malley, 117 Fed. Sup. 895.

I take it Your Honor doesn't want any discussion in the presence of the jury. I will just mention the authorities to Your Honor in support of my motion.

The Court: Well, I will deny motion as designated, motion for mistrial.

I might tell the jury at this time, so that you won't get led astray, sometimes we do indulge in some legal discussions between counsel and the Court in order to rule on motions and objections. I will tell you more about that at a later time in the case. But you are not to pay any attention to those discussions as matters of evidence in the case.

Pursuant to the Court's power and, indeed, it's

(Testimony of John Lautner.)

duty to rule on matters and supervise the trial and expedite it where possible, every time the Court is called upon to make a ruling you can't send the jury out. There are some courts that do that. If there is something of moment that would take considerable time, then the jury is sent out while the discussion goes on. But we can't do it every time we rule on a matter.

That would make a merry-go-round out of the pathway [373] between this court room and the jury room. So you must take for granted that what I am telling you is correct, that you are not to give any effect of any kind to these discussions that go on with respect to matters that require ruling by the Court. You will have enough to do to keep in mind the facts of the case without worrying about my part of it.

Now, what was the last?

Mr. Schnacke: Maybe it would be easier to restate it than try to find it.

Mr. Schnacke: Q. I think the question was, do you know where during the years 1949 and 1950 Sidney Steinberg had his office in New York?

A. At the Communist Party headquarters.

Q. And where is that located?

A. 35 East 12th Street; New York City.

Q. Is that in a building?

A. That is in a building.

Q. And what type of building is it, generally?

A. That is the headquarters of the Communist Party. It has nine floors. It extends from 12th

(Testimony of John Lautner.)

Street to 13th Street, all the way through a block.

Q. And in what—. I beg your pardon.

A. (continuing) And the various offices of the Communist Party, the National offices, the state offices—— [374]

The Court: Isn't that going beyond the question now?

Mr. Schnacke: Q. I was going to ask specific questions. On what floor are the national offices?

A. On the 9th floor.

Q. And are the New York state offices in the same building? A. Yes.

Q. On what floor are they?

A. On the fifth floor.

Q. During the year 1949 did you have an office in that building? A. Yes.

Q. And on what floor was your office?

A. On the fifth floor.

Q. On the fifth floor? What floor was Sidney Steinberg's office? A. He was on the ninth floor.

Q. On the ninth floor? Did Sam Coleman have an office in that building? A. Yes.

Q. And on what floor was he?

A. On the fifth floor.

Q. And where with respect to your office on the fifth floor was his office?

A. Two doors below my office.

Q. Who was in between your office and his?

Mr. Gladstein: Oh,——

Mr. Schnacke: Well, I will withdraw that question.

(Testimony of John Lautner.)

Mr. Schnacke: Q. Did Carl Ross ever have offices in that Communist Party headquarters in New York? A. Yes.

Q. And at what time?

A. Well, in 1941, 1942, and when I came back from the Army in 1945 also for a while.

Q. Did Sam Coleman have offices there at that time?

Mr. Gladstein: Just a second. I move that be stricken as remote, irrelevant, incompetent and immaterial; outside the scope of the issues here. January of 1941 to 1945, the witness said.

The Court: Well, I can't rule on—I will overrule the objection.

Mr. Schnacke: Q. Did Sam Coleman have offices in the building during the same period that Carl Ross had offices in the building?

A. I wouldn't know.

Q. That is, from 1941 to 1945?

A. I don't think so.

Q. Did Sidney Steinberg have offices in the building at that time? A. I don't think so.

Q. Did Robert Thompson have offices in that building during [376] that time?

A. No, he came into the national office during the war when he was relieved from the Army.

Q. Do you remember what year he took his office?

A. From 1944 on. Approximately from 1944 on up to the time I left the Communist Party.

Q. And on what floor were his offices?

(Testimony of John Lautner.)

A. At the beginning he was on the ninth floor and then on the fifth floor, and then on both floors, ninth and fifth.

Q. Now, during the summer of 1948 what was your position in the Communist Party?

A. During the summer of 1948 I was head of the New York State Review commission and security officer of the New York State organization of the Communist Party.

Q. In connection with your duties did you have a conversation with Robert Thompson during that year? A. Yes.

Q. Do you recall what part of the year it was?

A. It was in the month of August, about ten days after the national convention, 1948 National convention.

Q. And where was that conversation held?

A. I had numerous conversations with him. He was my superior in the Party.

Mr. Gladstein: Oh, that is not responsive. I move it be stricken. He was asked about a particular conversation [377] and where it was at. Now he is telling us about a lot of conversations and their relationship. I move it be stricken.

The Court: Well——

Mr. Schnacke: I think the last portion wasn't responsive.

The Court: The latter portion was not responsive. It may go out.

The Witness: A. Well, I recall a specific con-

(Testimony of John Lautner.)

versation about 10 days after the national convention.

Mr. Schnacke: Q. And do you recall who was present at that conversation?

A. Yes. He was present and Bill Norman was present.

Q. Who is Bill Norman?

A. Executive secretary of the New York Organization of the Communist Party.

Q. Who else was present?

A. At that particular time, only the two of them were present.

Q. And where was that conversation, did you say? A. In Bob Thompson's office.

Q. And what was the nature of that conversation?

Mr. Gladstein: Well, I am going to object to that as calling for hearsay; incompetent, irrelevant and immaterial.

The Court: I think that you will have to show some more foundation to justify a conversation in 1948 with [378] Thompson.

Mr. Foster: Conversations in furtherance of the conspiracy by one of the co-conspirators is clearly admissible.

The Court: Well, if it has to do with that subject matter.

Mr. Foster: I think this conversation will.

Mr. Gladstein: I think the foundation should be laid in some way besides counsel saying, "I think the conversation will show".

(Testimony of John Lautner.)

Mr. Foster: Don't you think the best evidence of that is the conversation?

Mr. Gladstein: I suppose Mr. Foster intends to address the Court rather than me. I am making a legal objection. I believe there is admitted risk that the witness will respond to the question by a general piece of testimony that is legally inadmissible and, I anticipate, would be prejudicial. There isn't a sufficient basis to show the existence of a conspiracy at that time, to be furthered, conspiracy of these defendants to be furthered by anybody or anything they said as of that date.

The Court: Of course, the law is that the statement of a conspirator may be admissible up to a point, admissible against himself only, and then depending on the introduction of other evidence it may become admissible against others.

Mr. Foster: If Your Honor please—— [379]

The Court: But this is something new. This is a situation where you have a co-conspirator who is not a defendant.

Mr. Foster: You understand in this indictment, Your Honor, Thompson is a principal. This is an accessory after the fact case. Thompson is a principal and the other defendants are accessories.

The Court: Yes.

Mr. Foster: Thompson is in a very peculiar position in this case, and for that reason it isn't an ordinary case in which you have a number of defendants. He is in the position of a co-conspirator in a harboring charge, which is the third count.

(Testimony of John Lautner.)

Mr. Gladstein: Excuse me for interrupting. I didn't mean to interrupt his train of thought, but I think Mr. Foster is launching into the kind of argument Your Honor indicated earlier shouldn't take place in front of the jury. If there is going to be a protracted argument by Mr. Foster I suggest it be out of the presence of the jury.

The Court: Can't you pass to some other subject except this one conversation and come back to it? Or would that entirely throw out your line of testimony?

Mr. Schnacke: I think it would be advisable to make the offer to Your Honor and to state the position that the [380] Government takes at this time.

The testimony of this witness is based upon the premises stated by Mr. Foster, and I think whether we proceed with the witness will depend on Your Honor's ruling at this time.

The Court: Just on this particular conversation?

Mr. Schnacke: Well, Your Honor, the testimony of this witness will proceed from this conversation to other matters, but it would depend upon, I think, the conversation itself.

Mr. Gladstein: Would Your Honor notice that the earliest date mentioned in the indictment—doesn't say conspiracy—earliest date is in count one, October 14, 1949.

Mr. Schnacke: Of course, the date of the con-

(Testimony of John Lautner.)

spiracy isn't measured by the date of the overt act mentioned in the indictment.

Mr. Gladstein: It says the conspiracy came after that date. That is what it says in count one.

Mr. Foster: If Your Honor please, the second count in the indictment is a conspiracy count, and the second count charges it took place at a time and place to the grand jury unknown.

Mr. Gladstein: Count one? But count two, that gives the object. Paragraph 2 of the second count tells what the object was. If Your Honor will take a look at lines 21 to 24 [381] Your Honor will see that refers to something taking place after this date in 1949.

Mr. Schnacke: Your Honor please, I will attempt to lay a further foundation through this witness and then proceed and see if we can handle the matter in a different fashion.

Mr. Schnacke: Mr. Lautner, calling your attention to the defendant Sam Coleman, would you tell us again the period of time during which he had his offices at Communist Party Headquarters?

A. To my personal knowledge he had his offices at the Communist Party New York State Headquarters from May, 1947,—at least from May, 1947, when I came into the building, up to the summer of 1949.

Q. And during that period of time did you see the defendant Coleman in association with any other of these defendants in this case?

A. Yes.

(Testimony of John Lautner.)

Q. With which of the defendants?

A. With George Thompson.

Q. George Thompson is not a defendant in this case, Mr. Lautner. I am referring to the defendants sitting at the defendants' table here.

Mr. Gladstein: I move that the answer be stricken as not responsive.

Mr. Schnacke: Yes, I have no objection. [382]

The Court: The answer about Thompson may go out.

The Witness: A. I have no recollection of seeing any of the defendants together in that period with Sam Coleman. I have no personal knowledge of it.

Mr. Schnacke: Q. That is, during the period of May, 1947, until the summer of 1949?

A. Summer of 1949.

Q. Do you have any knowledge of any of these defendants other than Mr. Coleman being in association with Mr. Coleman at any other time?

A. Yes.

Q. At what time was that?

A. That was in December—let me see—November or December, 1949. There was a banquet at the Yugoslav Hall.

Mr. Gladstein: I object to that.

The Court: Yes. You have already answered the question. What is the next question?

Mr. Schnacke: Q. And in November or December of 1949 with which of these defendants did you see Mr. Coleman in association?

(Testimony of John Lautner.)

Mr. Gladstein: Well, I guess I have been tardy in objecting about association, if Your Honor please. I object to that because that is just an opinion and conclusion of the witness.

The Court: Yes. I will sustain that objection. You will [383] have to be more specific in your questions than that. All that does is give the witness an opportunity to give his views.

Mr. Schnacke: Yes, Your Honor. [383-A]

Mr. Schnacke: Q. Did you see Mr. Coleman with any of these defendants in August—in October or November of 1949?

A. I did not. There was a discussion referring to where Coleman should——

Mr. Gladstein: Just a moment.

Mr. Schnacke: Just a moment.

Mr. Gladstein: Both Mr. Schnacke and I are objecting to that.

Mr. Schnacke: Yes, that I think wasn't responsive, Mr. Lautner.

Mr. Schnacke: Q. Did you see the defendant Coleman in the presence of or with Robert Thompson at anytime?

A. Oh, yes, numerous times.

Q. And during what period of time was that?

A. From the summer of 1947 all the way up to the end of 1949.

Q. And where?

A. At 35 E. 12th Street, at the State Headquarters of the Communist Party.

Q. And did you see them at any other places?

(Testimony of John Lautner.)

A. I have no recollection. I have no recollection of that.

Q. And approximately how many times would you say?

A. Oh, yes, I do have. At the New York State convention of the Communist Party in 1948.

Q. And Mr. Coleman and Mr. Thompson were both in attendance—— [384]

A. At that State Convention.

Q. In 1948? The 1948 State Convention?

A. That's right.

Q. And where was that convention held?

Mr. Gladstein: I object to that as incompetent, irrelevant and immaterial. If he is trying to show that that particular defendant personally was acquainted with Robert Thompson at that time, that Mr. Schnacke has the right to do within limits. But to start asking him what happened at the convention——

Mr. Schnacke: I didn't ask him what happened. I asked him where it was held.

The Court: He asked if he was present there, as I recall the question.

Mr. Gladstein: I don't think he did.

The Court: What was the last question?

(Thereupon the reporter read: "Where was the convention held?")

The Court: Q. Where was it held?

A. At Webster Hall, Your Honor. Webster Hall in Manhattan in New York.

Mr. Schnacke: Q. I call your attention to the

(Testimony of John Lautner.)

defendant Steinberg. Have you ever seen him in the presence of any of the other defendants in this case?

A. No. I could. I have no recollection of it.

Q. Have you ever seen him in the presence of Robert Thompson? [385]

A. Oh, yes. I also saw Steinberg, Sid Stein, in the presence of Carl Ross at the 1948 National Convention.

Q. So Carl Ross was also present at that convention? A. That is correct.

Q. And you said Coleman was present at that convention?

A. Coleman was present at the State Convention.

Q. I beg your pardon.

A. He might have been at the National Convention. I have no recollection of it.

Q. But Steinberg and Ross you saw at the National Convention? A. That is right.

Q. In 1948? A. That is correct.

Q. Mave you seen Steinberg in the presence of Robert Thompson? A. Yes.

Q. And where was that? At this National——

A. At the National Convention in 1948.

Q. And have you seen them at any other places?

A. I could have seen. I have no recollection.

Q. I call your attention to the defendant Carl Ross, and other than his connection with the defendant Steinberg that you have previously mentioned, have you seen him in connection with or in

(Testimony of John Lautner.)

the presence of any of the other defendants in this case?

A. Yes, in the presence of Sid Stein and also in the presence [386] of the defendant Bob Thompson.

Mr. Gladstein: That is the same answer as stricken out before. I move it be stricken, Your Honor.

The Court: Well, the answer is not irrelevant. The designation of Thompson as a defendant is incorrect. I will allow it to stand and strike the word "defendant."

Mr. Schnacke: The word "defendant" should be stricken, yes, Your Honor.

Mr. Schnacke: Q. Now, Mr. Lautner, in connection with your duties in the Communist Party, did you have occasion to work with any of the defendants in this case? A. Yes.

Q. And with which of them?

A. With Sam Coleman and Sid Stein.

Q. And did you have occasion to work with Robert Thompson? A. Yes.

Q. What was Robert Thompson's relation in the Communist Party organization to you?

Mr. Gladstein: I am going to object to this as incompetent, irrelevant and immaterial; no proper foundation: doesn't prove or disprove any issues in the case.

The Court: Well, it has to do with the alleged relationship of the parties.

Mr. Gladstein: To each other?

The Court: Yes. [387]

(Testimony of John Lautner.)

Mr. Gladstein: I don't understand it. He is being asked what the witness' relationship was to Robert Thompson.

The Court: No, he asked what Robert Thompson's position was in the party.

Mr. Gladstein: In relation to the witness.

Mr. Schnacke: In relation to the witness. Whether he was his superior or subordinate or entirely different.

The Court: I will overrule the objection.

The Witness: A. As State Chairman of the Communist Party he was my superior in the New York State organization, and also as a member of the National Committee he was a superior officer to me.

Mr. Gladstein: If Your Honor please, I move that be stricken because it hasn't been fixed as to time. It isn't probative of any issues.

The Court: State the time.

Mr. Schnacke: Q. At what time was that?

A. Well, this was in 1945, 1946, 1947, 1948 and 1949, and then early December of 1950 before I left the party. [388]

Q. What relationship did you have with the defendant Coleman?

A. We were both members of the New York State Organization Commission, he in his capacity as——

Mr. Gladstein: I am going to object to this, Your Honor. This is not competent, relevant or material, no proper foundation has been laid. We

(Testimony of John Lautner.)

are not concerned with what his occupations were, back in those days. It is remote, it is probative of any issue, if Your Honor please, and I ask Your Honor to rule that until they offer some evidence of the alleged conspiracy that this is immaterial.

The Court: I cannot go along with you on that because nobody can offer evidence of conspiracy. That is a matter for the jury to determine from all the circumstances. I will overrule the objection.

A. In the New York Commission we both functioned in the New York State Organization Commission, he in his capacity as a member of the educational department and head of the review commission——

Mr. Schnacke: Q. When was that?

A. This was from 1947, May on up until about the middle of 1949.

Q. And in connection with the security duties you had in the New York State Party did you have any dealings with any of these defendants? [389]

A. Yes, with both of them, with Sid Stein and Sam Coleman.

Q. In connection with your security duties did you have a connection with Robert Thompson?

A. Yes.

Mr. Schnacke: I submit, Your Honor, that there has been shown a sufficient relationship between the various persons here, a sufficient association in the Party to lay a foundation for the conversation toward which the Government is pointing by the questions asked earlier today.

Mr. Gladstein: Will Your Honor bear in mind again that——

The Court: If you have come to a point where you want to have that determined, I suppose we might, for once, excuse the jury. Members of the jury, I have thought a little more about the plans for tomorrow, and I think what we shall do tomorrow morning is that instead of having you come back in the afternoon at all, to give you more time for what you have to do tomorrow afternoon, and to accomplish that, we will commence the session tomorrow morning at 9:30 and we will only have the forenoon session, and you will be excused for the afternoon. I think you will all probably like that better. You can do more what you intended to do. I will excuse the jury at this time. The Court will remain in session. Please return tomorrow morning at 9:30.

(Thereupon an adjournment was taken to the hour of 9:30 o'clock a.m., Friday, April 16, 1954.) [390]

The Clerk: United States vs. Kremen, et al, further trial.

Mr. Schnacke: Ready. Your Honor please, the Government would like to supply Your Honor with a memorandum later in the morning. Until such time as Your Honor has an opportunity to rule on the matter discussed yesterday, we ask permission to withdraw the witness Lautner until some later time and proceed with other witnesses at this time.

The Court: Very well.

Mr. Schnacke: Burnett Britton.

BURNETT BRITTON

called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. Burnett Britton. B-u-r-n-e-t-t B-r-i-t-t-o-n.

Direct Examination

Mr. Schnacke: Q. Mr. Britton, what is your occupation?

A. I am a special agent of the Federal Bureau of Investigation. [392]

Q. And for how long have you been so employed? A. Six years.

Q. And to what office are you assigned?

A. The San Francisco office.

Q. Are you acquainted with or familiar with the Twain Harte cabin at which certain of these defendants were arrested on August 27, 1953?

A. Yes, sir.

Q. Mr. Britton, did you have occasion to visit that cabin on August 26th, 1953? A. Yes, sir.

Q. And at what time of day was that?

A. It was approximately 2:35 p.m.

Q. How did you approach the cabin?

A. I beg your pardon, sir?

Q. How did you come to the cabin, on foot or in some other way?

(Testimony of Burnett Britton.)

A. I drove in an automobile.

Q. At that time whom did you see at the cabin?

A. I saw two men and one woman.

Q. Can you identify in the courtroom the woman that you saw at the cabin on that occasion?

A. Yes, I can.

Q. And where is that woman?

A. The woman is sitting at the defense counsel table with the [393] gray dress with the white cuffs and white collar.

Mr. Schnacke: May the record show the defendant Shirley Kremen has been identified?

Mr. Schnacke: Q. And can you recognize in the courtroom either of the men that you saw at the cabin on that occasion? A. Yes, I can.

Q. And would you designate the man you saw?

A. The man that I saw was the man sitting at the defense counsel table with the brown suit on and the blue tie, wearing glasses.

Mr. Schnacke: Identifying the defendant Samuel Coleman.

Mr. Schnacke: Q. Do you see the other man in the courtroom? A. No.

Q. Would you describe the other man that you saw on that occasion?

A. He was a man of approximately 40 years of age, six foot, 200 or 220 pounds, large build, with strawberry blond hair.

Q. I show you Plaintiff's Exhibit 2 and ask you if that is the man that you saw at the cabin on August 26, 1953? A. This was the man.

(Testimony of Burnett Britton.)

Q. And Government's Exhibit 2 is the photograph of Robert Thompson. Where did you see Mrs. Kremen on the premises? [394]

A. Mrs. Kremen was standing in the door of the cabin, the door located at the eastern side of that particular cabin.

Q. Was she engaged in any activity or simply standing there? A. She was standing there.

Q. And where did you see either or both of the men, in what part of the area, on that occasion?

A. I saw both the men at a Ping-pong table located in the parking area to the south of the cabin.

Q. Did you observe any motor vehicles in the cabin area on that occasion? A. Yes, I did.

Q. How many cars were there?

A. I beg your pardon?

Q. How many cars were there?

A. One car was there.

Q. One car. And what kind of automobile was that? A. That was a Chevrolet.

Q. What body style?

A. A Chevrolet coupe.

Q. Do you remember the color of it?

A. Yes, the color was light green.

Q. And where was the car, in what part of the area?

A. That was located in the parking area to the south of the cabin, at the easternmost end of that area.

(Testimony of Burnett Britton.)

Q. Did you see that same automobile later that day? A. Yes, I did. [395]

Q. And where did you see it?

A. I saw that automobile at the approach, the eastern approach of Sonora, California.

Q. And could you recognize who was in the automobile at that time? A. Yes, sir.

Q. How many people were in the car?

A. One.

Q. Who was that person?

A. Mrs. Kremen.

Q. Did you have occasion to visit the premises at Twain Harte cabin thereafter?

A. Yes, I did.

Q. And when was that?

A. At midnight of the same day, August 26th.

Q. And how close to the cabin were you at that time? A. Approximately 100 to 150 yards.

Q. Where were you?

A. I was up on the hill to the south of the cabin, on a little road that is located there.

Q. And what did you observe at the cabin at that time?

A. I observed one automobile there.

Q. What was the condition of the cabin?

A. One light was on in the cabin.

Q. I take that at midnight it was dark. Could you identify [396] the automobile at that time?

A. No.

Q. And did you come back to the cabin again after that? A. Yes.

(Testimony of Burnett Britton.)

Q. And when was that?

A. I passed in the vicinity of the cabin at approximately 3:00 a.m.

Q. And what did you observe then?

A. I merely observed the general outline of the cabin.

Q. Were there any lights on at that time?

A. I observed no lights at that time.

Q. And when did you next arrive at the cabin?

A. The next time I arrived at the cabin was—would have been the second time on August 27th. The 3:00 o'clock a.m. visit there was on August 27th. Again on August 27th at approximately 1:05 p.m.

Q. You came in with the raiding party, is that right? A. I did.

Q. And at that time did you observe automobiles at the cabin? A. I did.

Q. How many cars were there at that time?

A. Two.

Q. Were either of those cars the 1950 green Chevrolet coupe that you had referred to as being there on the 26th? A. Yes. [397]

Mr. Schnacke: No further questions, Mr. Britton.

Cross Examination

Mr. Gladstein: Q. Mr. Britton, are you connected with the San Francisco office?

A. I am.

Q. Did you leave for Twain Harte from the San Francisco office? A. I am.

(Testimony of Burnett Britton.)

Q. Did you leave for Twain Harte from the San Francisco office on the 26th or prior thereto?

Mr. Schnacke: If Your Honor please, I will object to that as being immaterial, outside the scope of the direct examination, going to the state of mind and instructions of this witness, and not being a proper subject of cross examination.

Mr. Gladstein: I didn't ask about his state of mind. I asked when he left from San Francisco.

Mr. Schnacke: The testimony of this witness started at the time he visited the cabin.

The Court: Well, I will overrule it.

Mr. Gladstein: Q. Do you want the question read, Mr. Britton? A. Yes.

Mr. Gladstein: Would you read it, Mr. Reporter?

(Question read.)

The Witness: A. Yes.

Mr. Gladstein: Q. Excuse me, my question is a little ambiguous because I said, "Did you leave San Francisco on the 26th or prior thereto." Was it on the 26th or some date before?

A. On some date before.

Q. What date before? A. August 25th.

Mr. Schnacke: I will object to that, going too far beyond the scope of direct examination.

The Court: Well, perhaps it might go in a general sort of way to the subject matter of when he went there. I will overrule the objection.

The Witness: A. On August 25th.

Mr. Gladstein: Q. Were you accompanied by anyone, Mr. Britton, or alone?

(Testimony of Burnett Britton.)

A. I was accompanied.

Q. Could you tell me with what agents you went? A. Yes.

Mr. Schnacke: Is this when he went to the cabin? When he went toward Twain Harte on August 25th?

Mr. Gladstein: Yes.

Mr. Schnacke: I suggest that is beyond the scope of the direct examination and not material.

Mr. Gladstein: If Your Honor please, there has been other agents who testified, and there will probably be additional ones who will testify, and I am entitled to know the circumstances, persons, inquire into that subject matter in order to test the accuracy the particular witness' testimony.

Mr. Schnacke: Something that happened two days before?

Mr. Gladstein: Well, the Court can rule. It is within the scope of the cross examination.

The Court: Well, it is remote, but it is hard to draw a line. Overruled.

Mr. Gladstein: Q. Give the names of those who accompanied you on the 25th, Mr. Britton.

A. Agent James G. Carlisle and Joseph Galligan.

Q. And in a general way is it true to say that you were accompanied by them or with them—. Is it true to say that they were with you from that period on until the time of your arrival?

Mr. Schnacke: I object to that as being imma-

(Testimony of Burnett Britton.)

terial unless he confines it to the period to which the witness has testified.

Mr. Gladstein: I don't understand the objection, Your Honor.

The Court: Well, it is remote, Mr. Gladstein.

Mr. Gladstein: All right, I will withdraw that, Your Honor. [400]

The Court: If you get a little closer——

Mr. Gladstein: I will put it another way, then:

Mr. Gladstein: Q. Let's start at 2:35 p.m., August 26th. That is when you visited the area of that house, is it? A. That is correct.

Q. And I don't remember if I heard you say how close you got to the house, but will you tell us again if you have already told us?

A. How close I got to the cabin, or the vicinity?

Q. Yes. A. The cabin?

Q. Yes.

A. Approximately five yards.

Q. And were you on foot or were you driving an automobile or what?

A. I have testified that I was in an automobile.

Q. At the time? A. At the time.

Q. So that—. Oh, did you stop at the house or pass by or what? A. I stopped.

Q. Did you go into the house? A. No.

Q. Did you engage in any conversation with any of the people there? [401] A. No.

Q. When you say you got about five yards from the house, does the road pass within five yards of the house, or thereabouts?

(Testimony of Burnett Britton.)

A. There is a driveway.

Q. A driveway? I wonder if you would be good enough, Mr. Britton, to assist me in that and indicate, if you would—. Have you seen this before, this type of exhibit (handing exhibit to the witness)? A. Yes.

Q. You understand that? Have you seen that very one or a duplicate of that so that you are familiar with it? A. Yes.

Q. Would you tell us—the jurors all have copies—would you tell us by referring to that exhibit—. By the way, I think that is Exhibit 1, is it not? Yes. Would you tell us just what your course was at and immediately before 2:35 p.m., when you visited the place?

A. The course that I took was up the entrance driveway to the front of the cabin, approximately where the word "front" appears on this diagram.

Q. Yes. And you came to a stop there?

A. Yes.

Q. At that time were you driving the automobile, or somebody else?

A. Someone else. [402]

Q. And you were a passenger in another vehicle, is that it? A. I was a passenger.

Q. Who was driving the vehicle?

A. An employee of the Pacific Gas & Electric Company.

Q. Who was it?

A. It was a man by the name of Robert Summers.

(Testimony of Burnett Britton.)

Q. Robert Summers? I am making a guess: Was the vehicle a Pacific Gas & Electric Company vehicle? A. Yes.

Q. And where had you picked up Mr. Summers?

Mr. Schnacke: I object to that as being immaterial.

The Court: Well, overruled. [403]

A. In Sonora, California.

Mr. Gladstein: Q. When?

A. Approximately——

Mr. Schnacke: I object to that as being immaterial, outside the scope of the direct examination.

The Court: Overruled.

Mr. Witness: A. At approximately 1:50 p.m.

Mr. Gladstein: Q. On the 26th or the 25th?

A. August 26.

Q. August 26? Had you made arrangements with Mr. Summers beforehand to do that?

Mr. Schnacke: I object to that as being immaterial and outside the scope of the direct examination, what arrangements were made.

The Court: I will sustain that objection because motives and arrangements and plans are not part of the factual issues of the case.

Mr. Gladstein: Well——

The Court: Although it is, of course, quite obvious; but nevertheless it isn't part of the issues in the case.

Mr. Gladstein: Q. When the vehicle stopped—excuse me, I want to ask you another question. Other than Mr. Summers, who was driving the

(Testimony of Burnett Britton.)

P G & E vehicle, and yourself, was anybody else in the car? A. No. [404]

Q. How were you dressed at that time?

A. I was dressed in khaki clothes—khaki shirt and khaki pants.

Q. And how was Mr. Summers dressed?

A. Mr. Summers had on a blue sport shirt and light blue checkered trousers.

Q. Now, then, at about 2:35 or thereabouts Mr. Summers brought the vehicle to a stop about five yards from the entrance of the house and the car stopped for awhile, is that right?

A. I didn't catch that last part.

Q. And the car stopped there for awhile?

A. Yes.

Q. How long was it there?

A. Approximately three minutes.

Q. You didn't leave the car? A. No.

Q. Did Mr. Summers leave the car?

A. Yes.

Q. What did he do?

A. He approached Mrs. Kremen.

Q. Yes. What else did you see him do?

A. Then he went to the right side of the cabin. I did not watch what he was doing.

Q. Did he make an inspection of the electric light meter or [405] gas meter?

A. I did not see him do that.

Q. Did you tell him to do that before he left the car? A. No.

(Testimony of Burnett Britton.)

Mr. Schnacke: I object to that as being immaterial.

The Court: Sustained.

Mr. Gladstein: Q. And then after about three minutes he came back, is that correct?

A. Yes.

Q. And you drove off? A. Yes.

Q. Now, during that period I think you said you saw Mrs. Kremen. You saw a man whom you have identified as Thompson, and you saw the defendant Coleman, is that right?

A. That is right.

Q. And I think you said you saw Mrs. Kremen standing in the door? A. Yes.

Q. Anything unusual about her conduct that you observed? A. Nothing unusual.

Q. You mentioned that the two men were at a ping pong table but I don't recall whether you said they were playing ping pong. Did you observe whether they were?

A. Yes, they were playing ping pong.

Q. Now, at that time, Mr. Britton, did you have with you [406] any photographs of Mr. Thompson or anybody else? A. No.

Q. When you came down there from San Francisco with Mr. Gallagher and Mr. Carlisle, did you have with you any photographs?

Mr. Schnacke: I object to that, being outside the scope of the direct examination and immaterial to any issues in the case.

Mr. Gladstein: Your Honor has already per-

(Testimony of Burnett Britton.)

mitted me to divulge that information. I am simply asking if he has photographs at a time that he has already told us about.

The Court: Well, it is very far afield.

Mr. Gladstein: Well, I will take your ruling, Your Honor.

The Court: However, let him answer.

The Witness: A. I must state here that I did not come from San Francisco with Mr. Gallagher.

Mr. Gladstein: Q. Would you straighten me out on that? I had the impression——

A. I believe you said at the time I came from San Francisco with Mr. Gallagher and Mr. Carlisle did I have photographs. I wasn't with Mr. Gallagher at that time.

Mr. Schnacke: It is Galligan—G-a-l-l-i-g-a-n. There is also an agent Gallagher, but he is a different man.

Mr. Gladstein: Thank you very much, Mr. Schnacke.

Mr. Gladstein: Q. Correcting my question, Mr. Galligan [407] and Mr. Carlisle and yourself at that time came from San Francisco, and did you have photographs? A. Yes.

Q. And did you have a photograph of Thompson? A. Yes.

Q. Did you have a photograph of Steinberg?

A. Yes.

Q. Did you have any photographs of Mr. Coleman? A. No.

(Testimony of Burnett Britton.)

Q. Didn't have any photograph of any of the other defendants, did you? A. No.

Q. Now, how far away would you say you were from the men who were playing ping pong?

A. Approximately 18 yards.

Q. Eighteen yards? That is about the length of this courtroom, I guess.

A. I would not hazard a guess in that respect. I had checked that distance the following day by pacing it off, and that is the way I arrived at the 18 yards.

Q. You mean you came back the following day and you actually paced off the distance between the spot where the P G & E vehicle was and the ping pong table? A. I did.

Mr. Gladstein: What is the length of this courtroom, [408] if Your Honor please?

The Court: Now you've got me. I have sat here for years, but I never——

Mr. Gladstein: It isn't of any great moment. I am guessing that it is about 50 feet.

Mr. Gladstein: Q. You wouldn't care to indicate to us, Mr. Britton, whether the distance is approximately the distance between where you are now seated and, say the wall at the further end of this room? Was it closer, would you say, or farther?

A. I wouldn't hazard a guess in that respect. The area over which I was looking was an incline, and I am familiar with the fact that distances appear quite different on inclines as contrasted to this courtroom, which is on a level.

(Testimony of Burnett Britton.)

Q. Did you get a clear look at the two men who were playing ping pong? A. I did.

Q. Did you recognize either of them?

A. No, I didn't.

Q. What is your answer? A. I did not.

Q. You didn't recognize one of them as Robert Thompson? A. No, I did not.

Q. Now, then,—. Well, after Mr. Summers came back the [409] party just drove off, is that correct?

A. That is correct.

Q. I understood you to say that some time later the same day, the 26th, you saw this Chevrolet automobile, and I think you mentioned in Sonora, am I right about that? A. That is correct.

Q. Would you tell us, please, what time of day that was? And where in Sonora you saw the automobile?

A. That was on the eastern outskirts of Sonora at approximately 4:15 p.m., August 26th.

Q. Four-fifteen? And would you be good enough to give us the relationship between Sonora and the town of Twain Harte so that the jurors can be oriented as to just where it is?

A. I recall the distance as approximately 14 miles.

Q. Is Sonora a town? A. Yes.

Q. About 14 miles away from the village of Twain Harte, is that correct?

A. That is right.

Q. At about 4:15 you saw the Chevrolet auto-

(Testimony of Burnett Britton.)

mobile and saw Mrs. Kremen in it in the town of Sonora? A. That is correct.

Q. Did you have her under observation then?

A. I observed her, yes.

Q. Well, let me ask you this: Had you been following her? [410] A. No.

Q. Were you in Sonora—withdraw that.

Had you been in the town of Sonora for some time before you observed her there?

A. Yes.

Q. And where was it that you saw her?

A. At the eastern end as the highway enters the main street of Sonora.

Q. For how long did you have her under observation? For how long?

A. For a few seconds.

Q. Few seconds? Was the car in motion or stationary? A. In motion.

Q. In motion? Did you observe where she was going? A. Yes.

Q. Was she going shopping?

A. No, she was merely going down the main street.

Q. Down the main street? You saw no one in the car with her? A. No.

Q. Was there anything unusual you can tell us about her conduct or with respect to that vehicle on that occasion?

A. The fact that it was moving extremely slowly, in that that was the main thoroughfare,

(Testimony of Burnett Britton.)

and I believe there are regulations restricting speed in that area.

Q. Well, let's see. What are the regulations? What is the [411] speed regulation in that place?

A. I don't recall, other than remembering a sign there which slowed cars down.

Q. Which said to go slow?

A. I don't recall what it said.

Q. Not the exact language, but a warning to maintain a reduced speed or slow speed, is that it?

A. Yes.

Q. And the unusual thing you observed about the car Mrs. Kremen was driving was that it was going slow, is that it?

A. That is the one fact I recall about it, speed.

Mr. Gladstein: If Your Honor will bear with me just one moment? That is all.

The Court: Anything else?

Mr. Schnacke: Is that all, Mr. Gladstein?

Mr. Gladstein: Yes.

Mr. Schnacke: Nothing further.

The Court: That is all.

(Witness excused.) [412]

Mr. Schnacke: If Your Honor please, I have an exemplified copy of the seal of the Director of Revenue of the Department of Revenue of the State of Missouri, with the subscription of the Supervisor of Motor Vehicle Registrations, Department of Revenue, State of Missouri, and the seal and signature of the Notary Public of the State of Missouri authenticating certain automobile title doc-

uments in the State of Missouri, which I will ask to be received in evidence as Government's exhibit next in order.

Mr. Gladstein: Your Honor, my objection is not based on any question of the authenticity of the document. In other words, I am not going to require Mr. Schnacke to bring somebody from St. Louis to testify that those are records. I will accept Mr. Schnacke's statement as a representation that this is a true photostatic copy of some letters that they have there.

Mr. Schnacke: The authentication speaks for itself under the statutes of the United States.

Mr. Gladstein: I say I raise no question about that. The only question I do raise, I am objecting to the materiality and competency of the documents offered upon the grounds heretofore advanced in our motion to suppress.

Mr. Schnacke: The materiality will be shown by the next two witnesses.

The Court: You are offering just these particular [413] automobile registrations?

Mr. Schnacke: Yes.

(The automobile registrations referred to were thereupon received in evidence and marked Government's Exhibit No. 105.)

LEONARD LICHTENSTEIN

was called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and the jury?

A. Leonard Lichtenstein.

Direct Examination

Mr. Schnacke: Q. Mr. Lichtenstein, where do you reside?

A. St. Louis. Do you want my address?

Q. No. You are a resident of St. Louis?

A. St. Louis, Missouri.

Q. Are you employed there? A. Yes, sir.

Q. By what organization?

A. Hudson Lindell-At-Grand, Incorporated.

Q. That is three words? [414]

A. Hudson Lindell-At-Grand, Incorporated, is the name.

Q. And that is a corporation?

A. Yes, sir.

Q. Are you an officer of that corporation?

A. Yes, sir.

Q. Are you acquainted with the business records and procedures of that corporation?

A. Yes, sir.

Q. What is the nature of the business of the corporation?

A. We have a new car agency, Hudson agency.

(Testimony of Leonard Lichtenstein.)

Q. You are in the business of selling new Hudsons? A. That is right.

Q. I show you four documents and ask you if those documents are business records of your corporation? A. Yes, they are.

Mr. Schnacke: May the four documents be marked under one number Government's Exhibit next in order for identification?

(The documents referred to were thereupon marked Plaintiff's Exhibit No. 106 for identification.)

Mr. Schnacke: Q. Would you describe what the general nature of each of the documents are, starting with the first of them?

A. Well, the first is a shipping record of the automobile [415] when it is sent to us from the Hudson Motor Car Company in Detroit. Then we receive from the truck, the transport company that delivers the car—do you want me to give the description?

Q. No, just the general nature of the documents.

A. The next is our new car inventory showing the price and the motor company and the cost of the car to us. The next item is what we call a bill of sale. In other words, when we sell an automobile we fill out the description and the motor number and the price, and the buyer signs the order for the automobile.

The next is a Department of Revenue, State of Missouri, use tax form. They have a use tax of two per cent in the State of Missouri, and we have to

(Testimony of Leonard Lichtenstein.)

fill out this application with the amount of tax, and then the buyer signs this Department of Revenue paper and pays his tax to the State of Missouri, two per cent, on the sale price of the car.

Q. Referring to the car order or the bill of sale that you referred to, do you recognize the handwriting of anybody on that car order form?

A. Yes, I do.

Q. What parts of it do you recognize?

A. A salesman that worked for us by the name of Walton.

Q. What part of that do you recognize as being his handwriting? [416]

A. Well, he signs it as salesman. In other words, he is selling the car.

Q. In the left-hand corner where it says, "Walton"?

A. In other words, there are various other markings that he has on here: the car, the "Hudson," the "7C," the "four-door," the "1953," and then he has "one 1951 Oldsmobile" and "1618"; also title, and $40 was put down as a deposit, as showing the cash on delivery of $1,578.

Q. I call your attention to the car shipping record and delivery receipt and to the fact that there is handwriting opposite the words "charge to" there, and ask what that handwriting represents in the ordinary procedure?

A. One is we put a car number on it, we number every automobile, and then from the keys as they are delivered in from the factory, we write the key

(Testimony of Leonard Lichtenstein.)

number down on this order in case anybody loses their keys that we can issue a duplicate.

Q. Does that key number appear on your inventory card?

A. Yes, it appears under "key number" on the right-hand top corner.

Mr. Schnacke: That is all, sir. Thank you.

WOODROW WALTON

was called as a witness on behalf of the Government, and being first duly sworn, to tell the truth, the whole truth and nothing but the truth, testified as follows: [417]

The Clerk: Q. Will you please state your full name to the Court and jury?

A. Woodrow Walton.

Direct Examination

Mr. Schnacke: Q. Mr. Walton, where do you reside? Where is your residence?

A. St. Louis.

Q. In June 1953 by whom were you employed?

A. Hudson Lindell-At-Grand.

Q. Is that the organization with which Mr. Leonard Lichtenstein is connected?

A. Yes, he was vice president.

Q. What was the nature of your employment at that corporation? A. I was a salesman.

Q. A new car salesman?

A. A new car salesman.

(Testimony of Woodrow Walton.)

Q. You were selling Hudson automobiles, is that right? A. Yes, sir.

Q. Mr. Walton, will you look around the court room and see if you find anybody in this court room to whom you sold a Hudson automobile in 1953? I might suggest that you exclude the jury. I doubt that you sold them.

A. The fellow with the brown suit on—could he stand up?

The Court: Who is he pointing to? [418]

Mr. Schnacke: Q. Are you referring to the second man at the defendant's table there with the brown coat?

A. Yes, the one that is doing the writing.

Q. With the blue suit? A. No.

Q. I mean the blue shirt?

A. The gentleman with the glasses on.

Mr. Schnacke: Identifying the defendant Samuel Coleman.

Q. I show you Government's Exhibit 106, which are four documents identified as records of the company by which you were employed, and ask if you recognize those or any of those records?

A. Yes, this a bill of sale which we always make out when we sell a car, and this is the paper that we have them sign for sales tax purposes.

Q. Do those papers reflect a sale to the man that you have just identified or to some other person?

A. No, that was the gentleman that traded the Olds—he signed this paper right here.

Q. What name did he sign?

(Testimony of Woodrow Walton.)

Q. You said it was something else. It is Mr. Gordon here.

Q. What is the name in full?

A. William B. Gordon, and that was the name that was on the title that he gave me.

Q. The name that was on what title, sir? [419]

A. To his Oldsmobile.

Q. Referring to those documents, to refresh your recollection, will you tell us in response to my questions about that transaction. On what date did you sell the car to Mr. Coleman, whom you say represented himself to be William B. Gordon?

A. It was in June, on June 5th.

Q. Do you recall when you first saw him in connection with that sale? A. On June 5th.

Q. Had you ever seen him before? Had you known him? A. No, I did not.

Q. Do you recall what occurred on June 5th?

A. He came in and he was looking at the cars, and he asked what we would give on his, the same transaction as we had on many sales. I had the officials go out and appraise the car, and they came in and they said they thought it was wrecked, and that made us all look at it real close. And I guess I talked him out of thinking it was wrecked, because anyway he must have made the best deal and I got the sale. That is what I was there for, to sell a car.

Then when we went to the office he said, "When can I have it?"

I said, "When would you like to have it?"

(Testimony of Woodrow Walton.)

He said, "As soon as possible. I want to go on a [420] vacation."

I said, "How about tomorrow?"

He said, "That will be fine." We signed up the necessary papers and the next day he brought me the money and took the car.

Q. He brought the money to you on the following day?

A. Yes, he brought it into the office.

Q. How did he make that payment, by cash, check or otherwise?

A. I am trying to think. I believe it was cash because I usually mark them "check" if it is a check.

Q. The total price paid for the car was how much, Mr. Walton? A. $3,423.37.

Q. And you allowed a certain amount on the Oldsmobile, did you? What was the amonut of that allowance? A. $1,618.

Q. Mr. Walton, what was the license number of the Oldsmobile that was turned in on that automobile? A. C54274.

Q. And what was the license number of the Hudson automobile that you sold to Mr. Gordon, as you knew him?

A. What we do in the State of Missouri is, we take the license off the old car and put them on the new car, and then they make out a license transfer and the Government [421] sends them a transfer through the mail. I mean they mail it in.

(Testimony of Woodrow Walton.)

The Court: Q. So they have the same license number? A. The same license number.

Mr. Schnaeke: Q. I understand in Missouri the license number follows the owner of the car rather than following the automobile itself, is that it?

A. Yes, that is right.

Q. So the Hudson automobile had the same license plate number on it that the Oldsmobile previously had? A. Yes.

Q. And that number was what?

A. C54274.

Q. And it was registered in what state?

A. Missouri.

Q. In Missouri? A. Missouri license.

Q. You have referred, I think, to the car order as being a document Mr. Gordon signed in your presence. Did he sign any of these other documents in your presence?

A. Yes, there should be a license and title transfer paper that usually goes with a sale.

Q. Is that a paper that is sent into the Department of Motor Vehicles? A. Yes. [422]

Q. I call your attention to Government's exhibit 105 and ask if the last paper in that exhibit is the document to which you refer? A. Yes.

Q. Or if any of the documents within that exhibit are the ones to which you refer?

A. These two right here are the ones that were signed in front of me.

Q. You are referring to the second of the certified documents, application for Missouri certificate

(Testimony of Woodrow Walton.)

of title, referring to a 1953 Hudson automobile, and on that document he signed his name to the original of that in your presence? A. Yes.

Q. Did you deliver the car to him?

A. I delivered it personally, yes.

Q. How many sets of keys were there on the car when you delivered them?

A. Two sets, two trunk and two ignition, so that is two sets of keys.

Q. There were two keys for the ignition and two keys for the trunk?

A. Yes, your ignition will open your door, too. The trunk will open your glove compartment. That is all the keys you need.

Q. By examining the documents that you have there can you [423] tell us the key numbers of the keys that were delivered to him with this automobile? A. H788 and H909.

Q. Do you know what that key number means? Is that a number that is on the key itself?

A. Yes, that is a stamped number that is on the face of the key.

Q. Is it on the key or is it simply on a record maintained for the key?

A. No, it should be on the key.

Q. Do you know what that refers to?

A. What do you mean, sir?

Q. Do you know what that number signifies?

A. No, I do not. It is just a number of a key. That is all I know.

(Testimony of Woodrow Walton.)

Mr. Schnacke: Thank you, sir. No further questions.

Mr. Gladstein: No questions.

(Witness excused.)

Mr. Schnacke: I will ask at this time that Government's Exhibit 106 for identification be received in evidence.

The Court: It may be admitted.

Mr. Gladstein: I suppose that is intended to be offered against the defendant Coleman, Your Honor. Am I right about that?

Mr. Schnacke: No. [424]

Mr. Gladstein: I would object to it being received as against anybody else.

The Court: At this time it will be admitted against the defendant Coleman.

(Thereupon documents previously marked as Government's Exhibit No. 106 for identification were received in evidence, against the defendant Coleman only.)

ALFRED TODT

was called a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and jury?

A. My name is Alfred Todt.

Direct Examination

Mr. Schnacke: Q. Mr. Todt, where do you reside?

A. I live in Berkeley, California.

Q. What is your employment?

A. I am a locksmith by trade.

Q. Are you self-employed? A. I am.

Q. Where is your place of business? [425]

A. 67 Second Street, San Francisco.

Q. For how long have you been engaged in the business of locksmith?

A. More than 20 years.

Q. Generally in San Francisco?

A. All the time in San Francisco.

Q. Can you tell me generally what the business of locksmith consists in, what type of work do you do as a locksmith?

A. Well, we make keys, of course, repair locks, set up master key systems, change combinations, and so forth.

Q. Are you familiar with the internal structure of a lock and the relationship of the key to it after 20 years in business? A. I feel that I am.

(Testimony of Alfred Todt.)

Q. In connection with your work do you have occasion to work with keys to automobiles?

A. I do.

Q. Mr. Todt, are there distinguishing characteristics about keys that identify one key from another key or distinguish one key from another key?

A. Yes, there is what we call key ways, which distinguishes one from the other.

Q. What is a key way, Mr. Todt?

A. That would be the shape of the section through the key.

Q. What do you mean by the section through the key? [426]

A. If you just looked at it this way, you will see there is a definite shape to the key, and that is what we call a key way.

Q. That is without regard to cuttings?

A. The cuts would be the combination on that particular key.

Q. A key way is an identification of a blank key as well as of a key that has had the other markings cut in it? A. That is correct.

Q. Is there any further way of distinguishing one key from another?

A. Well, from one manufacture to another there would be a distinguishing character.

Q. By the manufacturer's stamp on the key?

A. That is right.

Q. Are the cuttings on a key a third way?

A. That is correct.

Q. Mr. Todt, are you familiar with the symbol

(Testimony of Alfred Todt.)

numbers that motor vehicle manufacturers give to their keys? A. I think so.

Q. In connection with your work do you have occasion to work with those symbol numbers?

A. I do.

Q. I would assume that in making keys for a lost automobile an automobile whose I might lose, that was one of the ways in which you determined what key you were going to make so I can [427] get in my car when I have lost my key, is that it?

A. That is correct.

Q. Mr. Todt, I will show you Government's Exhibit No. 19 for identification and Government's Exhibit No. 96 for identification, each of them being two sets of keys, and I will ask you first to compare those two sets of keys and ask if there are any similarities between the keys in the two separate sets?

A. You have two pair of keys here In other words, you have two alike, two sets, two complete sets.

Q. So that each set is identical to the other set. There are two different keys in each set, and one key in each set is identical with the other key in the other set as to key style and cut, is that right?

A. That is correct.

Q. As a matter of fact, Mr. Todt, you have seen those keys before, have you not?

A. I have.

Q. And you have examined them?

A. I have.

(Testimony of Alfred Todt.)

Q. And you made that examination at the request of representatives of the Government, is that right? A. That is correct.

Q. And with what were you asked to compare those keys? What information was given to you when those keys were given to you [428] for examination?

A. I was given some numbers, and the question was whether those numbers, the keys cut from those numbers be compared with these keys here.

Q. Do you remember what those numbers were?

A. One of them was H788 and the second was H909, if I am not mistaken.

Q. You say they were H788 and H909?

A. That is correct.

Q. Did those numbers have any meaning to you in connection with keys?

A. Well, they mean this, that if you did not have these keys at all, given that number—H909, for instance—we could look it up in the code book and supply the key from that number.

Q. And the key that you supplied would bear what relationship to two of these keys that you have here?

A. Depending upon the number given, it would compare to either one of these keys.

Q. You say there is a code book that contains the age numbers or those symbol numbers that manufacturers use for keys?

A. That is correct.

Q. By looking in that code book what do you

(Testimony of Alfred Todt.)

discover? If, for example, you look for H788, what does the code book tell [429] you?

A. It would give you the cuts, that is, these cuts along the top edge of the key. It would tell you how to cut them, the depths, and so forth.

Q. Would it also tell you the blank key form to use? A. That is correct.

Q. By examining those keys and comparing them with the numbers given to you what determination did you make?

A. We determined that these could possibly have been used in a Hudson automobile. [430]

Q. And did you determine whether or not the cuts on the keys and the style of the keys correspond with the key numbers as given you by representatives of the Government?

A. We checked that and they did.

Q. And they did correspond?

A. And they did correspond.

Q. So that cut of keys would be made up if you were making up No. H-788, and the other key would be made up if you were given the number H-909?

A. That is correct.

Q. Mr. Todt, how many cuts are there on those keys? That is, how many different places are there to cut? A. Five spaces.

Q. Five spaces? And to how many different levels may that cut be made? A. Five.

Q. Five levels? A. Five levels.

Q. So the possible number of individual keys would be five to the fifth power, is that correct?

(Testimony of Alfred Todt.)

A. That is correct.

Q. And that would be some 4000 possible cuts?

A. Roughly.

Q. And that is true for each of those two keys?

A. Correct. [431]

Q. So the possible combination of both keys at one place would be 4000 times 4000?

A. That is correct.

Mr. Schnacke: No further questions.

Cross-Examination

Mr. Gladstein: Q. What do you mean by that last answer, Mr.—. Is it Todt?

A. Todt.

Q. What do you mean by that last answer, "possible"? Was that about both sets of keys being 4000 to the multiple?

A. The question was asked, there were roughly 4000 possible combinations. Having two keys, you would have 4000 times 4000, whatever that would multiply out to.

Q. I don't understand the figure. I wonder if you would explain that, what 4000 times 4000 has to do with the keys?

A. The question is, as I understand it, that the attorney is trying to bring out the number of possible combinations.

Q. On a certain key?

A. On a certain key.

Q. If you use that size key with five different levels and all that sort of thing?

A. That is right.

(Testimony of Alfred Todt.)

Q. You can cut one angle going this way and another going down, and so forth? [432]

A. You cut keys to definite depths. In this particular key you have five spaces and five depths for each space, which would give you five to the fifth power.

Q. Well, that is interesting. When you look at this code book to find out, just suppose you don't know what kind of car a particular key comes from, but you have a key and start looking at the code book, they have some picture or some designation that tells you—gives you some identifying data that this is going to be a Hudson of a certain character to which you will compare that key.

A. Yes. We can look at the code book and it tells what key-ways were used on Hudson, for instance.

Q. Is that what you did? A. Yes.

Q. You resorted to some kind of guide book?

A. That is correct.

Q. Do you have it with you? A. Yes.

Q. Could I look at it, please?

A. Yes, sir.

Q. If you don't mind, I would like to examine the keys, too. If you need them at any time in your testimony, you tell me. Is that the guide book?

A. There are two here, if you would like to check.

Q. I think I will have enough trouble with one at a time. [433]

A. Well, perhaps this is easiest for you. Up here

(Testimony of Alfred Todt.)

at the top corner you will find a picture of the key.

Q. That is used by a certain manufacturer?

A. Yes. Down here, if you want to look, is Hudson.

The Court: The jury can't hear you.

Mr. Gladstein: The jury can't hear?

Q. Well, I tell you what you do, Mr. Todt, you hold that up so the jury can see what you are pointing at and tell us how to use that guide book.

A. Well, if we wanted to make the key with No. H-909, first of all we would have to check what blank to put it on.

Q. On what?

A. What key blank to cut that particular key on.

Q. That is, if you are already told there is something on the key that says H-909, is that it?

A. Well, I will start over again. Perhaps I am confusing it. If we wanted to make a key with No. H-909——

Q. Yes?

A. ——first of all we would have to find out what key blank to cut it on.

Q. And how would you do that?

A. We can look right here, and under Hudson, for instance, there is No. H-909. On the side it gives a letter number which tells us which blank to cut it on.

Q. Is Hudson the only manufacturer or business concern in [434] the United States that uses the letter H on its keys? A. I don't think it is.

Q. Well then, how would you know whether to

(Testimony of Alfred Todt.)

look for Hudson or any of the other manufacturers that use the letter H on the key if all you had was H-909?

A. We have already started with No. H-909.

Q. That is given to you?

A. That is given to us.

Q. Are you also given the key?

A. No. If you give me the number H-909 and tell me to make a key to that number, I have to find out what key blank to make it on. I do that by looking at the chart, and it tells us. After we do that, we look up the number H-909 and find what combination to actually cut on that particular key blank.

Q. I am not going to ask another question about that, although I must confess I don't understand it.

Were you asked by the FBI to make a set of keys for the number H-909? A. No.

Q. You didn't actually make any keys for them?

A. No.

Q. They didn't give you a number and say, "Mr. Todt, you make up a set of keys for us and show us whether you can just with that information make up a set of keys that will fit what we have"? They didn't do that? [435] A. They did not.

Q. But when they gave you the number H-909, do they just say "H-909", or also tell you "Hudson"? You have to know it is Hudson, don't you?

A. I don't have to know, no. All I did was compare the numbers given me with that key.

(Testimony of Alfred Todt.)

Q. Now these, they have numbers on them, don't they?

A. I don't recall whether they did or not.

Q. Were you told that these were automobile keys that this number had reference to?

A. I was asked to compare those keys against the code numbers that were given to me.

Q. All right, now, let's see if we can short-cut this a little bit: with the cellophane container marked 19, it looks like a set of car keys.

A. That is correct.

Q. One of those appears to be the one that operates the ignition and the other the back trunk.

A. I assume that that is correct.

Q. Which of those is H-909 and which is the other number, do you know?

A. Not offhand. I would have to check that for you.

Q. All right, now, then this other exhibit, No. 96. On 96, you testified that these keys are exactly the same as 19, is that correct? [436]

A. That is right.

Q. In other words, one of them is H-9—whatever the number is? A. That is correct.

Q. You can tell by looking at them they seem to be identical, by making a visual comparison, can't you? A. That is correct.

Q. Hold one against the other and—well. So that you have two sets, right?

A. That is correct.

Q. Tell me, sir, are you familiar with the num-

(Testimony of Alfred Todt.)

bers of sets of keys that the Hudson people in 1953 issued with their new cars?

A. To the best of my knowledge, for that last 20 odd years that have used a number with a prefix H.

Q. No, no, I mean the number of keys a customer is given?

A. How many they are given?

Q. Yes. A. I have no idea.

Q. You have bought automobiles, haven't you?

A. Ordinarily I get two.

Q. Do you know whether Hudson dealers were giving more than two sets of keys?

A. I don't know that.

Q. You don't know that? Did you make a record or some notations or a report of how you came to arrive at the [437] conclusion about the number—the H number? A. I did not.

Q. Well, when did you reach that conclusion? When was it?

A. The keys were brought to me the latter part of August in 1953.

Q. And when did you make your examination?

A. We did it at the moment the agent brought them in.

Q. How long did it take you to do that?

A. Just a matter of a few minutes.

Q. And did you come up with the numbers immediately? A. We had the number.

Q. You had the number? Who gave you the numbers? A. The agent.

(Testimony of Alfred Todt.)

Q. Oh. Well, then, what he did—. Did he have the keys, too? A. That is correct.

Q. In other words, the FBI agent came to you and he said, "Here is No. H909 and here is No. eight hundred and something, and here are some keys, and I want you to tell me if those numbers correspond to those keys"?

A. That is correct.

Q. He didn't give you the keys and say, "You find out the numbers for me", did he?

A. He did not.

Q. He didn't give you the numbers and say, "Make up some keys", did he? [438]

A. He did not.

Q. Did he tell you he was trying to establish that the numbers he gave you and the keys he gave you corresponded to each other?

A. That is correct.

Mr. Gladstein: I don't think I have any further questions.

Mr. Schnacke: That is all, thank you.

The Witness: Thank you.

(Witness excused.)

The Court: We will take a brief mid-morning recess now, ladies and gentlemen of the jury.

(Short recess.)

Mr. Schnacke: If Your Honor please, at this time I will ask that Government's Exhibit 19, which Erickson testified he found on the dresser in the cabin, be received in evidence against Mr. Coleman.

Mr. Gladstein: If Mr. Schnacke is waiting——

Mr. Schnacke: Well, I will make the offer of both. I assume your objection will go to both.

I will ask that Government's Exhibit 96, which Agent Smith testified he found on the person of Robert Thompson, be received in evidence against the defendant Coleman.

Mr. Gladstein: I make the objection that we made heretofore in connection with the motion to suppress, if Your Honor please.

The Court: Very well. The exhibits will be admitted. [439]

(Whereupon Government's Exhibits 19 and 96, heretofore marked for identification, were received in evidence as against Defendant Coleman.)

WALTER C. DONNER

called as a witness on behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

A. Walter C. Donner.

The Clerk: Will you please speak up a little louder? Spell your last name.

A. D-o-n-n-e-r.

Direct Examination

Mr. Schnacke: Q. Mr. Donner, where do you reside? A. Camdenton, Missouri.

Q. That is Camdenton—C-a-m-d-e-n-t-o-n—Missouri? A. That is right.

(Testimony of Walter C. Donner.)

Q. In what part of the state is that?

A. Well, it is pretty much in the center of the state. A little to the southern center.

Q. And what is your occupation, sir?

A. I am the owner and operator of a motel and cottages.

Q. Is that in the city of Camdenton? [440]

A. Yes.

Q. How far from the center of town is that?

A. We are just a mile.

Q. A mile?

A. One mile from the center of town.

Q. How big a community is Camdenton?

A. A little over 1200 population.

Q. In May of last year and July of last year did you operate the cabins at the same place?

A. I did, sir.

Q. Now, sir, will you look at the defendants in this case, who are sitting at this table on that side of the room, and tell me if you have ever seen any of them before? A. One man.

Q. And which one man is that?

A. The one in the brown suit and glasses on the right of the table.

Mr. Schnacke: Identifying the defendant Samuel Coleman.

Q. Can you tell us approximately when it was that you first saw Mr. Coleman?

A. It was Memorial weekend. I can't remember whether the 29th or 30th that he came in. The 29th, I believe, of May.

(Testimony of Walter C. Donner.)

Q. That would be the 29th or 30th of May?

A. Yes.

Q. And of what year? [441]

A. 1953.

Q. 1953? And where did you see him?

A. Well, he stayed at my place and I saw him in the office and saw him outside.

Q. And for how long did he stay at your place?

A. Two days at that time.

Q. Was he alone? A. No.

Q. How many people were with him?

A. There were three others.

Q. Three others? And what was the—were they men or women?

Mr. Gladstein: I object to the question.

A. One man and two women.

Mr. Gladstein: Just a second. I move that be stricken. I object to that as incompetent, irrelevant and immaterial, if the Court please; of no consequence to the issues of this case. If there is going to be some effort to relate the defendant Coleman to some particular person, that is one matter. On the other hand, it is a general——

The Court: (Interposing) He has to start somewhere.

Mr. Gladstein: Counsel knows where he wants to start and I think it is a valid objection, if Your Honor please, which I should like to assert to the Court.

Mr. Schnacke: Well, I will withdraw the ques-

(Testimony of Walter C. Donner.)

tion at this time. I don't want to offend anybody by my questions. May I [442] ask it this way:

Q. Were there other people with him?

A. Yes.

Q. And was one of those persons a man?

A. Yes.

Q. And how many people were with him altogether? A. Three.

Q. Now, I will show you a card and ask you if you can tell me what that card is.

A. Well, it is one of my registration cards at the camp.

Q. And this registration card was used by you on what occasion, Mr. Donner?

A. For the registration of Mr. Gordon.

Q. Whose handwriting is on that card?

A. Well, it is Mr. Gordon's, as I knew him at that time.

Q. Will you speak a little bit louder, please?

A. Mr. Gordon.

The Court: He said it was "Mr. Gordon as I knew him at that time."

Mr. Schnacke: Q. And how much of the writing on that card is his?

A. All of it except the number of the cottage and the date and the amount. The rest of it is all his writing.

Mr. Schnacke: I will ask that the card identified by the witness be marked for identification, to bear the Government's [443] next number in order.

(Testimony of Walter C. Donner.)

(Whereupon registration card referred to above was marked Plaintiff's Exhibit No. 107 for identification.)

Mr. Schnacke: Q. Mr. Donner, you have stated that on May 30th, 1953, when Mr. Gordon registered at your cabins there was another man with him. Can you describe that man?

A. Well, as I remember him, he had a moustache, dark hair, rather chunky, heavy-set man.

Q. Did you have an opportunity to observe that man——

A. Not very much.

Q. ——during the time he was living there?

A. I didn't observe him as much because he wasn't in the office as much.

Q. Did you have any conversations with the other man?

A. If it was, it was very little.

Q. Did you have any conversation with Mr. Gordon other than at the time of his registration?

A. Yes. I tried to arrange for boats for them, and I talked to him about that, and he used a phone.

Q. Did you arrange for a boat for him?

A. Yes, I did.

Q. With whom?

A. At that time it was with a small camp and boat dock. Well, it is owned by Mr. and Mrs. Jack Stotler. [444]

The Court: Can you hear? Read the last question and answer. Get a little closer to that micro-

(Testimony of Walter C. Donner.)

phone, Mr. Donner. Read that last question and answer.

(Question and answer read by reporter.)

Mr. Schnacke: Q. After the weekend around May 30th of 1953, did you see the defendant Coleman, whom you knew as Gordon, on any later occasion? A. On July 4th and 5th.

Q. And where was that?

A. At my place.

Q. Did he take a cabin there again?

A. Yes.

Q. And was he with the same people he was with on the first occasion? A. Yes.

Q. And on that occasion did you arrange for a boat for him?

A. No, he had already made his arrangement when he was there before. Also, he had made arrangements for the cabin.

Q. I beg your pardon?

A. He had also made arrangements for the cabin ahead.

Q. And you did not assist him in the boat arrangements on that occasion?

A. No, I did not.

Q. I will show you a guest registration card and ask you if that is the registration card that relates to the second visit [445] of Mr. Gordon and his friends? A. It is, yes.

Q. And is that, too, in his handwriting in the same fashion as the first card you described?

A. Yes.

(Testimony of Walter C. Donner.)

Q. Except for the number of the cottage and the date and the—— A. Amount paid.

Q. ——amount paid? A. Yes, sir.

Mr. Schnacke: I will ask that that be marked for identification as Government's exhibit next in order.

(Thereupon registration card referred to above was marked Plaintiff's Exhibit 108 for identification.)

Mr. Schnacke: Q. And how long did the party stay there on the second occasion, Mr. Donner?

A. Well, two days or two nights.

Mr. Schnacke: No further questions, Mr. Donner.

Cross-Examination

Mr. Gladstein: Q. Mr. Donner, when did some representative of the Government first speak to you about possibly being a witness or giving testimony in this case?

A. It was in August of last year.

Q. And was there one agent or more than one agent at that [446] time?

A. I believe there were two at the first call.

Q. I take it from your last answer that there were several occasions when they talked with you?

A. Yes.

Q. How many altogether?

A. I believe about six.

Q. Six? Now, at the time that they first came to you did they have some photographs they wanted you to look at? A. They did.

(Testimony of Walter C. Donner.)

Q. And on each of the succeeding occasions did they have photographs, too? A. They did.

Q. And they showed you photographs of different people, asked if you had ever seen them before in your place? A. That is right.

Q. Then it's correct to say as a result of about six conferences with them and looking at different photographs you said you thought you could identify one of those photographs as the man who registered as Gordon in your place?

A. That is right. It was the second call that I identified it.

Q. The second time? A. Yes.

Q. The first time you weren't able to do so?

A. No. [447]

Q. Now, after identifying him the second time, then the later times, third, fourth, fifth and sixth, is it true to say that they were trying to see whether you could refresh your recollection to recognize some other photographs? A. That is right.

Q. Did they mention the name of the person that they were trying to get you to identify?

A. No.

Q. Didn't tell you? But they did show you pictures? A. That is right.

Q. Before you took the stand here, of course you talked to Mr. Schnacke or Mr. Foster or some attorney for the United States, didn't you?

A. Yes.

Q. And they told you they would like you, if possible, if you could search your memory and

(Testimony of Walter C. Donner.)

possibly identify more than Mr. Coleman, if possible, didn't they?

A. Well, they asked me to identify pictures, is all.

Q. Did they show you pictures of each of the defendants in this case? A. No.

Q. Did they show you a picture of a man named Robert Thompson? A. Yes.

Mr. Gladstein: No further questions.

Mr. Schnacke: That is all, thank you. [448]

(Witness excused.)

Mr. Schnacke: Mr. Meyers.

ODIE E. MEYERS

called as a witness on behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

A. Odie E. Meyers.

The Clerk: Will you spell your name?

A. O-d-i-e E. M-e-y-e-r-s.

Direct Examination

Mr. Schnacke: Q. Mr. Meyers, where do you reside? A. Camdenton, Missouri.

Q. And what is your occupation?

A. Well, I operate a fishing dock or boat resort.

Q. You are also, a very good fishing guide, aren't you? A. That is right.

(Testimony of Odie E. Meyers.)

Q. That is what I have understood, in any event. On what body of water is that?

A. Well, that is on the Lake of the Ozarks.

Q. And that is located in and around Camdenton, Missouri, is it?

A. Yes. It takes in parts of three counties. [449]

Q. How long have you operated that boat dock, Mr. Meyers?

A. It will be five years this May.

Q. So that you were operating it in July of last year? A. That is right.

Q. Now, sir, will you look at the various persons at the table on my left and tell me if in connection with your business you have even seen any of those persons?

A. At this other table (indicating)?

Q. Yes.

A. There is one man that I have saw.

Q. Which man is that?

A. The man with the brown coat?

Q. The one who has his head down and is writing? A. Yes.

Mr. Schnacke: Identifying the defendant Samuel Coleman.

Q. Approximately when did you first see him, to the best of your recollection?

A. I don't know the exact day. It was on the weekend of the Decoration Day holidays, prior to July 4th holiday.

Q. Decoration Day is the May 30th holiday?

A. Yes. I don't remember just what day of the

(Testimony of Odie E. Meyers.)

week that fell on at the present time. I know that it fell——.

Q. In any event, it was some time around the end of May? A. That is right.

Q. And in what year? [450]

A. That was last year.

Q. And where did you see him?

A. They came down on our dock.

Q. By "they" whom do you mean?

A. Well, it was he and a lady.

Q. Did you have a conversation with him at that time?

A. Yes. They made reservations for the 4th of July holiday.

Q. Reservations for what? A. Boats.

Q. For boats? And did you see them after that time, or did you see the defendant after that time?

A. Yes. They came down and fulfilled their reservations over the 4th of July holiday.

Q. He rented a boat from you, is that right?

A. Well, they rented two boats.

Q. Two boats? A. That is right.

Q. And how many persons were present with him at the time you saw him on the 4th of July holiday?

A. Well, there was four people at that time.

Q. Four people? And was there another man with him? A. Yes, sir.

Q. In your conversations with the defendant Coleman did he identify himself by name?

A. Yes, sir, he did. [451]

(Testimony of Odie E. Meyers.)

Q. And what name did he use?

A. He used "Gordon".

Q. Did he introduce the other people who were with him? A. No, he didn't.

Q. With respect to the man that was with him, can you describe him generally?

A. Well, he was a somewhat taller man than Mr. Gordon was. He had a moustache. His hair was thinning. Rather a stocky built man. Other than that, there was no distinctive features about him.

Q. What color was his hair?

A. Well, it was sort of a reddish cast, I would say.

Q. I didn't get that answer.

A. It was a grayish reddish cast, or——

Q. Now, I will show you Government's Exhibit 3 and ask you if you have ever seen the man in that picture before? A. Yes.

Q. Is that the man that you refer to as having been with the defendant Coleman on the occasion you have mentioned? A. Yes, it was.

Mr. Schnacke: That is the picture of Robert Thompson.

Q. Now, I will show you Government's Exhibit 2, which is a color photograph, and ask if that appears to be the same man that you saw at your boat dock? A. Yes, it does. [452]

Q. Is that the color that his hair was on that occasion?

A. It is—I am not too familiar with color, but

(Testimony of Odie E. Meyers.)

it seemed like it was a little bit more of grayish color, but there was a reddish tint to it.

Q. Are you color-blind, by any chance?

A. Not that I know of.

Q. Not that you know of? Now, around the 4th of July on how many different days did you see the defendant Coleman?

A. On how many different days?

Q. Yes.

A. It was three days that they were there.

Q. Do you recall what days that was or just that it was three days over that period?

A. I am not just positive. I know that it was over the 4th of July holiday. Whether it was the third, fourth and fifth, or the fourth, fifth and sixth, I am not sure.

Q. And on each of those days was the man whose photograph you have identified with the defendant Coleman? A. Yes, sir, he was.

Q. And you have stated that the man in the photograph was never introduced to you or identified by name?

A. No, we didn't—the reservations were made in the name of Mr. Gordon, and they made reservations and they paid us a deposit for the two boats, and we just registered the two boats under the one name, and they went together and came back [453] together, and as far as we were concerned, that was the only transaction that took place.

Mr. Schnacke: No further questions, Mr. Meyers.

(Testimony of Odie E. Meyers.)

Cross Examination

Mr. Gladstein: Q. You told us, Mr. Meyers, the only person in that group of people you talked with was the defendant, Mr. Coleman?

A. No, we talked to the group. That is, I talked to the group at different times.

Q. Did you go out with them?

A. No, I didn't go out with them.

Q. I see. What sort of a place was this that you were operating? A resort of some kind?

A. It is a fishing resort. We rent boats to people to go fishing, and we also take people out in boats. In other words, we furnish guides. We sell tackle, bait, lunch and refreshments, and you might say it is a fishing party outfitter is about what it would amount to.

Q. Did you have occasion to go out with Mr. Coleman in these boats?

A. No, I didn't go out with him.

Q. Did you have any business transactions with the other man?

A. Well, they bought minnows and we fixed them some poles. And of course I wasn't requested by the other man that I [454] remember of, but then we fitted a boat out for them, and they both would be, like it would be in front of this stand and we were right with them and fitting the equipment up for them, getting minnows for them, served them.

Q. Did you pay any particular attention to anybody in this party or this group?

(Testimony of Odie E. Meyers.)

A. Not particular at that time, no.

Q. You had other people, also, I suppose, as customers that day? A. Yes.

Q. It was a busy weekend?

A. Well, it was a busy weekend.

Q. You saw him on each of three successive days, is that right?

A. Yes, we saw them—well, one day I don't think they came in at noon, but they were in in the morning and evening, and I think one day they were in during noontime.

Q. So you gave them just passing notice, is that right?

A. No, when a boat comes in we meet the boat and we tie the boat up.

Q. I mean so far as the people in it were concerned, you would not pay any particular attention to them?

A. Well, they come within two or three feet of me. Other than that, I guess—I don't know just what you mean would be about particular attention by them. We would meet the boat and they would come past us, and they had to pass between a space [455] three feet in width to get out of the boat to come up on the dock.

Q. Is there a Mr. Scott or Stout or something similar to that running a similar place to yours in that area? A. Stout?

Q. Yes. A. Not that I know of.

Q. Or Scott?

A. No, sir, not that I know of.

(Testimony of Odie E. Meyers.)

Q. Did any other person in the area make arrangements for this fishing party, or was it Mr. Coleman?

A. No, Mr. Coleman and the lady that was with him was the ones made the arrangements, and they were made after the 30th of May.

Q. Do you know a man named Donner—Walter Donner? A. Yes.

Q. He runs a business there in that area?

A. Yes. His place is about, oh, I guess about a mile from our place.

Q. Did he make any arrangements at any time for Mr. Coleman to get any boats from you?

A. Not at my place, no.

Q. Now, when was it, Mr. Meyers, that any agent of the Government ever contacted you with regard to anything you might be able to testify to in this case? [456]

A. That, I just couldn't give you a definite date. It was some time last—late last summer or last fall, I would say, somewhere in that area—neighborhood. I don't remember exact dates or anything like that.

Q. And do you remember who it was that contacted you?

A. I don't know their names at present.

Q. How many of them contacted you?

A. Well, the first trip that they came down there, the first that we knew of anything was that they came down and asked for our registrations for that particular day. They identified themselves

(Testimony of Odie E. Meyers.)

as FBI agents and showed their credentials and their badges, and of course we produced them for them.

Q. You say when they first came to you they asked for your records concerning a particular day?

A. That is right.

Q. And what day did they ask you about?

A. Over the 4th of July holidays.

Q. All right. And then you produced those records, is that right? A. That is right.

Q. And then what happened?

A. Well, I would say it was about a week or two after that that they came down again.

Q. Had they taken the records with them or did they just turn them back to you? [457]

A. No.

Q. They just examined them and turned them back to you? A. Yes.

Q. They had no discussion with you about any of your customers, or anything like that, at that time?

A. No, they didn't state their business or anything.

Q. Did they show you any photographs on that occasion? A. No, sir.

Q. Then about a week later, you say they came back?

A. I believe it was longer than a week. I can't remember. It was several times that they were there. But I would say I believe it was a little longer than a week.

(Testimony of Odie E. Meyers.)

Q. On the second occasion, what took place then?

A. Well, they came down with some photographs. He had quite a number of them.

Q. How many did they have?

A. I don't know exactly. They had, I would say, 20 or 25 photographs. [458]

Q. When you say 20 to 30, do you mean photographs of 20 to 30 different people?

A. That is right, some black, some white, some male, some female.

Q. They showed you those photographs?

A. That is right.

Q. What did they ask you to do about them?

A. They asked us to identify anyone that had been at our place during those days from those photographs, or if we could pick anyone out of the group that had been there. That is the way they put it.

Q. You say "if we could pick out". You mean your wife was with you at the time?

A. That is right.

Q. Anybody else?

A. That is all that was present.

Q. Did you pick any out?

A. That is right.

Q. How many?

A. Just one at that particular time.

Q. And that was one that both you and your wife felt pretty sure of? A. Yes.

Q. Whose photograph was that?

(Testimony of Odie E. Meyers.)

A. That was Mr. Gordon's. [459]

Q. Then they came back at a later time?

A. That is right.

Q. And they showed you some more photographs? A. That is right.

Q. Am I right that at some later time you picked out the photograph of Mr. Thompson for them? A. That is right.

Q. They had a photograph of Mr. Thompson the first time, didn't they?

A. Not in the group, they didn't.

Q. Not in what group?

A. Not in the group they brought the first time.

Q. In which group did they have it?

A. I don't know definitely which time, but it was two or three times, I believe, after they were there the first time. The first group of photographs we looked at, the only picture that we identified was that of Mr. Gordon, and then they came back at different times with other photographs.

Q. Now, on later occasions when they came back, in addition to bringing photographs of different people, did they also bring back for a second or third inspection on your part some of the photographs that they had earlier brought to you so that you could get another chance to look at them? Did they do that?

A. Well, no, they brought back, I think, the first time that they were there, as I remember, we had a photograph of Mr. [460] Gordon, and I don't remember just exactly how he was dressed, but

(Testimony of Odie E. Meyers.)

then the next time they brought back those photographs, why, he had apparently been apprehended and the photo was in cuffs.

Q. It showed him in handcuffs?

A. That is right.

Q. And so they asked you if that was the same man?

A. They handed us this number of pictures and asked us to go through there and pick out anyone that we could identify as being at our place on those days. They never told us who were in the group or anything.

Q. Altogether during the period that they were coming back and forth to show you photographs, can you tell us how many such separate occasions there were when they brought photographs?

A. No, I can't. They were there several times.

Q. As many as ten?

A. I would say yes.

Q. How many different people did you and your wife finally select photographs of? A. Two.

Q. One was a photograph of Mr. Coleman, or known to you as Mr. Gordon, and the other was a photograph that you have been asked about and did identify here, is that right?

A. It was not that photograph, no.

Q. You never saw before either of the exhibits that were shown [461] to you today?

A. No, sir.

Q. You never saw those?

(Testimony of Odie E. Meyers.)

A. Not that one in color, and I don't believe that we saw that particular one, either one.

Q. How many times did you see a photograph? How many times did they show you and your wife a photograph of a man whose picture you identified here today in Exhibits 2 and 3? Will this help you to look at it?

A. No. I am not positive whether it was that particular one or not. The photos that we looked at were three different views.

Q. Front face, left profile, right profile?

A. Yes.

Q. On how many different occasions did they show you photographs of a man resembling the photograph that you have identified here today?

A. That I couldn't be specific about either because they were there with photographs several different times.

Q. Of that man? A. That is right.

Q. Did you select that man at the first time you saw those photographs or was it on a later occasion?

A. The first time that his picture was in a group we selected it. [462]

Q. You say "we did". Who did? You or your wife?

A. He handed me the pictures and asked me to pick them out, and then after I picked them out he handed the wife the group.

Q. Did you have any discussion with Mrs. Mey-

(Testimony of Odie E. Meyers.)

ers as to whether that was the man who was there?

A. No, there was no reason for discussion.

Q. You didn't have any? A. No.

Q. Have you ever discussed it with your wife as to whether you are sure that was the man who was there?

A. Well, I was positive of my identification.

Q. My question is have you ever talked about it with your wife as to whether your identification was accurate? A. No, I did not.

Q. What? A. I did not, no.

Q. Have you talked with your wife at all before you came to court here about this testimony that you have given?

A. We talked about it, yes.

Q. Have you talked with her about the identification of this particular man?

A. Yes, we talked about it.

Q. And did you talk with her about whether she was sure or you were sure that the man who was there with Mr. Gordon was this man whose photograph you picked out? [463]

A. Oh, nothing more than I told her that I was positive of the identification.

Q. Was that while the agents were present or after they had gone?

A. No, that was afterwards.

Q. How did it come up that you and your wife were talking about whether you could be positive about this?

(Testimony of Odie E. Meyers.)

A. We were sitting at the table over breakfast or something of that sort and it came up.

Q. Did you say something about not being sure whether that was the man? A. No.

Q. You have told us that the first time they showed you the picture of the man whose face resembled this exhibit that you identified today, No. 2, you picked him out as a man who was at your place? A. That is right.

Q. Did you tell the agents when you thought you had seen it?

A. Well, they asked us if he was there over those holidays.

Q. What did they ask?

A. They asked if he was in the company of Mr. Gordon.

Q. What was your answer? [464]

A. I told them it was.

Q. That was the very first time that they showed you a photograph of this man whose picture is in No. 2? A. That is right.

Q. Later on did they show you that same photograph again?

A. I don't know—I have no way of knowing if it was identically the same photograph or not, but as I explained a minute ago, the photographs that they had were photographs that had fingerprints

(Testimony of Odie E. Meyers.)

and one thing or another on the bottom of it. It was on a sheet. They were in a group.

Q. Now, the photograph that had fingerprints on, when did they show you that one? The second time that they came with pictures?

A. The first—I believe that type of picture is in the one we identified the first time of this man. To be honest with you, I can't remember specific about as to which photograph was which, because it has been some time ago and they were there several times and several photographs, and I would not want to commit myself as to just which time which photograph was there.

Q. At the time when they first came there you have told us they had a photograph of Mr. Gordon or the man you knew as Gordon?

A. That is right.

Q. They had a number of other photographs?

A. That is right.

Q. Men and women? A. That is right.

Q. You were not able to select any of the others out as being persons who had been there?

A. That is right.

Q. I ask you if among those other photographs you could not identify was a photograph that they told you was a man named Robert Thompson?

A. They never told us any names.

Q. Was there a photograph shown to you amongst them which appeared to have fingerprints on it? A. The first time?

Q. Yes. A. No, sir.

(Testimony of Odie E. Meyers.)

Q. Was there the second time?

A. I am not positive whether it was the second time or the third trip that they were there. They were there so many times that I can't remember definitely just which trip it was.

Q. Did they ever show you photographs of any of the other defendants that are seated here at the table?

A. Not that I can recollect.

Q. I beg your pardon?

A. Not that I remember of any of them. They brought us a photograph of some women and asked us if any of those were at [466] our place.

Q. And you picked out only two photographs altogether, that is, Mr. Gordon's and this other?

A. That is right, the other two people who were there. They didn't have photographs of those.

Q. Did they ever ask you to compare photographs of this man Thompson that they told you were taken at different times?

A. Well, the photographs that they brought us on the subsequent times, if I am not mistaken, were different photographs. In other words, each time they would have a different photograph.

Q. Of the same man? A. That is right.

Q. Did they tell you that these were taken at different times or something of that sort?

A. They never told us any thing of that nature. They just asked us to identify the people who had been at our place on those particular days from

(Testimony of Odie E. Meyers.)

the group of photographs that they would hand us.

Q. And you picked them out each time?

A. That is right.

Q. Of this man? A. That is right.

Q. Will you tell us the process that they went through when they came to you on these occasions, if it was the same throughout? How did they handle this? [467]

A. Well, there was times that they had the name on the photograph. He held the card over the lower part of the photograph blotting out the names and the charges and all that—in other words, all we could see would be just the photograph.

Q. Did he give you a batch of photographs and say, "Select any one or more", or did he give you one at a time?

A. On those that did not have those markings on he did, but the ones that had the names and the charges or whatever they were on the bottom, he blotted those out with another photograph or something.

Q. How many different photographs of this man Thompson did they show you over the course of these numerous occasions when they came to see you?

A. Oh, I imagine it would be—I think we saw as many as four or five, probably.

Q. Or more?

A. It is possible, yes.

Q. After your last conference with agents of

(Testimony of Odie E. Meyers.)

the Government regarding identification—by the way, could you date that for us? Approximately.

A. The last conference with regard to identification?

Q. Yes.

A. Of these two particular people?

Q. Yes. A. No, I could not. [468]

Q. Can't you tell us if it was last week, last month, or six months ago?

A. Oh, I could do that. It was not last week or it was not last month.

Q. You have told us what it was not. Will you tell us what it was?

A. Well, it was prior to that time.

Q. It was some time last year, was it?

A. Yes, as I remember, it was some time near the Christmas holidays.

Q. Then when you came to San Francisco did you have a conference with someone in regard to your testimony? A. No, sir.

Q. Did you have a talk with anybody at all in regard to identifying any of these photographs?

A. No, sir.

Q. Did you talk to any lawyers or any agent of the FBI about your testimony?

A. Well, this man here told us about when we were to be called.

Q. I do not mean that, I mean did you sit down and have a talk with him? Did you ask him what you would testify to, what you would identify?

A. No.

(Testimony of Odie E. Meyers.)

Q. Nothing like that? A. No, sir. [469]

Q. No agent did that either?

A. No, sir.

Q. Have you ever made a statement to them, signed it, as to what you could say on the witness stand? A. No, sir.

Q. You did not know before you got on the witness stand that they were going to ask you to identify No. 2 and No. 3, is that right?

A. That is right.

Mr. Gladstein: I have no further questions.

The Court: Anything else of the witness?

Mr. Schnacke: Nothing further.

The Court: I think that I shall give the jurors and others an opportunity to get away today and attend to your other business. We will meet again on Monday morning at ten o'clock. I hope you have a pleasant Easter.

But I must ask you to be careful to bear in mind what your duty is while you are away from the courtroom, and that is not to discuss the case among yourselves nor with anyone else under any pretext whatsoever discuss any phase of this case with you. I also suggest to you that you do not read newspaper accounts of the trial of the case. The reason I say that to you is you may unconsciously form some impression by something that has been written in some newspaper or stated over the radio concerning the case, and it is unfair in the conduct of [470] judicial proceedings. It is contrary to our concept of justice that the jurors do anything but

decide a case on the basis of what they get in the courtroom.

Also it is your duty not to form or express an opinion concerning the case until it is finally submitted to you.

We will resume the trial on Monday morning at ten o'clock.

(Whereupon an adjournment was taken until Monday, April 19, 1954 at 10:00 a.m.) [470-A]

The Clerk: United States vs. Kremen, et al, further trial.

Mr. Schnacke: Ready, Your Honor. Call Mr. Anderson.

HAROLD G. ANDERSON

was called as a witness on behalf of the Government, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court and to the Jury?

A. Harold G. Anderson.

Direct Examination

Mr. Schnacke: Q. Your name is Harold G. Anderson, is that right? A. That is correct.

Q. What is your occupation, Mr. Anderson?

A. I am a merchant.

Q. And where?

A. At Bigfork, Montana.

Q. In Bigfork, is that right?

A. Right. B-i-g-f-o-r-k, all one word.

Q. And where is Bigfork? [472]

(Testimony of Harold G. Anderson.)

A. On the northwest corner of Montana, at the head end of Flathead Lake, within 20 miles of Kalispell.

Q. Of where?

A. Kalispell, K-a-l-i-s-p-e-l-l.

Q. About how far is that from the Canadian border as the crow flies?

A. Approximately, if you fly up there, it would be about 50 miles, I would say.

Q. You say you are a merchant?

A. Yes.

Q. What type of business do you operate?

A. I have a general store. Well, practically every thing: lumber, groceries, hardware, soft goods.

Q. How large a town is Bigfork?

A. It isn't an organized town. It is approximately 200 people. It is just a spot in the county.

Q. Is it on a highway?

A. It is off of Highway 93 quite a little ways, but on State Highway 35.

Q. In connection with your general mercantile business there, do you also have authority to issue Montana State fishing licenses? A. Yes.

Q. Mr. Anderson, I will show you a book and ask you if you know what that book is? [473]

A. Yes, I do.

Q. And what is that, sir?

A. Well, it has my signature in it. This is the triplicate copies of the fishing license that I issued last summer.

Q. You say the triplicate copies?

(Testimony of Harold G. Anderson.)

A. This is the triplicate, you see. This is the last of the three.

Q. Each of these is a triplicate copy of a fishing license issued, is that correct?

A. That is right.

Q. I take it there were other copies? What happened to those?

A. The first copy made is the copy that contains the fishing permit. It is longer than that. You give that to the person purchasing the fishing license,—non-resident fishing license such as these.

The second copy is mailed in to the State at Helena, Montana with the remittance, and the third copy I retain in my files, which you have there.

Q. I see. What period of time is covered by these licenses or those copies?

A. The period of time here is from the 10th of August until this book ran out on the 11th.

Mr. Leonard: August? Was that the 11th of August, Your Honor? [474]

Mr. Schnacke: Q. The 10th and 11th?

A. The 10th of August and the book was used up by the 11th. That covers about ten licenses from number 661 to 670, inclusive.

Q. Did you issue the first two licenses that are referred to in that book? A. I did.

Q. Do you remember the circumstances of issuing those licenses and the persons to whom they were issued?

A. I remember it, yes, I do.

Q. Were they issued at the same time?

(Testimony of Harold G. Anderson.)

A. Yes.

Q. And to whom were those two licenses issued?

Mr. Gladstein: If Your Honor please, I am going to object to the question as to one of the licenses. And I will ask that counsel separate them. I have a particular objection to one that doesn't apply to the other.

Mr. Schnacke: Q. Mr. Anderson, I will call your attention only to the second of those licenses, then, and to whom was that license issued?

A. To J. F. Brennan.

Q. And who was present at the time of issuance of that license?

A. Myself, J. F. Brennan, and a Linda Brennan.

Q. And on what date was that license issued?

A. It was issued on the 10th of August. [475]

Q. Of what year? A. 1953.

Q. Can you describe the man who—. Did you have a conversation with the J. F. Brennan to whom that license was issued? A. I did.

Q. And J. F. Brennan is the name that he gave you, is it? A. That is right.

Q. Can you identify by a description the man who identified himself to you as J. F. Brennan?

A. I identified him personally at the New York trial.

Q. Well, can you tell us what he looked like?

A. Well, Brennan would be, I would say, about half an inch taller than I am, at a guess. At the time he was there, he had the—the most striking thing about Brennan is that his jowls hung down

(Testimony of Harold G. Anderson.)

this way quite a bit (indicating). And he had a mustache, and he was quite heavy at that time when I—of course I later saw him in New York——

Q. (Interposing) Without regard to the later occasion, describe him on this particular occasion to the best of your ability.

A. He had a kind of, well, he had kind of reddish brown hair, and he was about—I would have judged him to be about on this occasion, oh, 55 years old. Of course I know better now, and—. But he was put up to look that way, I think, at that time, but I didn't know that at that time. [476]

Mr. Gladstein: I move that be stricken.

The Court: The last part of the answer "put up to look that way" may go out.

Mr. Schnacke: Q. Now, I show you Government's Exhibits 2 and 3 and ask you if those are photographs of the man who identified himself to you as J. F. Brennan on the occasion you mentioned? A. They are.

Mr. Schnacke: I will ask that this book of triplicate copies of the fishing licenses be received in evidence as Government's Exhibit next in order.

Mr. Gladstein: Your Honor, I object to that upon the ground that it is hearsay. And I particularly object to one portion of it. Not the portion that reads "J. F. Brennan" part, but the other one, on the ground that it is incompetent, irrelevant and immaterial; introducing issues of a defamatory and prejudicial character; not within the fair intendments of the indictment.

(Testimony of Harold G. Anderson.)

Mr. Schnacke: I think I can obviate that. These are clipped together, and if you will permit me, I will remove the clip and introduce only the triplicate copy of the J. F. Brennan license.

The Court: It may be admitted.

(Thereupon fishing license identified above was received in evidence and marked Government's [477] Exhibit No. 109.)

Mr. Schnacke: We will just introduce the one page, then. No further questions.

Mr. Gladstein: No questions.

The Court: That is all.

(Witness excused.)

Mr. Schnacke: Mr. Spencer.

E. M. SPENCER

was called as a witness on behalf of the Government, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury? A. E. M. Spencer.

Direct Examination

Mr. Schnacke: Q. Mr. Spencer, where do you reside? A. At Polson, Montana.

Q. Polson? P-o-l-s-on? A. Yes, sir.

Q. Where in Montana is that located, sir?

A. Well, it is in the northwestern part, about 60 miles south of the Canadian line.

Q. And where is that with respect to a place called Bigfork? [478]

(Testimony of E. M. Spencer.)

A. Well, it is in a southwesterly direction across the lake. In other words, you would have to go around either end of the lake to get to that place.

Q. As the crow flies about how far apart are the two places? A. Thirty miles.

Q. What is your business in Polson, Mr. Spencer?

A. Well, I don't really live in Polson. I have some cabins and boats, a fishing camp, eleven miles north.

Q. Eleven miles north? And where is that with respect to the lake?

A. It is right on the lake. On the lakeshore.

Q. Are you on the highway, sir?

A. No, sir, we are half a mile off the highway, Highway 93.

Q. You say you are not in town?

A. Not in town, that is right.

Q. How close is the nearest other habitation to yours? A. You mean cabins?

Q. Well, habitations of any sort.

A. Well, we have residences on both sides of us right up the coast.

Q. How close is the nearest cabins?

A. Well, I should say from my line it is 50 feet, a fifty-foot lot between the first one.

Q. And you are on the shores of Flathead Lake, is that right? A. That's right. [479]

Q. Now, sir, I call your attention to August of last year and ask if during that month there was staying with you any person whom you see in this

(Testimony of E. M. Spencer.)

court room? Would you look around the court room, particularly with reference to the defendants table?

A. Yes, sir.

Q. And whom do you see there that was staying with you? A. The description?

Q. Yes, just generally.

A. The second one from the left, on the right-hand side of the table.

Q. Are you referring to the man in the brown coat and blue shirt? A. I do.

Mr. Schnacke: Identifying the defendant Coleman.

Mr. Schnacke: Q. Do you recall approximately when it was you first saw him?

A. Well, August 10th.

Q. Of last year? A. Last year.

Q. And was he alone? A. No, sir.

Q. Was this some other man with him?

A. Yes, sir.

Q. And were there other persons with him as well? [480] A. Yes, sir.

Q. And what was the nature of your contact with Mr. Coleman on August 10th of last year?

A. Well, they stopped there to fish.

Q. They stopped to fish at your cabins?

A. Yes, sir.

Q. Did you have any business transactions with them?

A. Yes, sir. We received a fee for them staying there.

Q. They took cabins? A. That is right.

(Testimony of E. M. Spencer.)

Q. They took one of your cabins to stay in, is that right? A. That's right.

Q. And how long did they stay with you in your cabin?

A. They checked out on August 17th.

Q. Did you keep a record of the time they were there and the purchases they made while they were there? A. Yes, sir.

Q. I will show you a slip of paper and ask if you can identify that?

A. Yes, sir. This is the transaction that we had at that time.

Q. Did you have any transactions reflected there with Mr. Coleman, with the gentleman that you have identified? A. No, sir.

Q. Was that with another man in the party?

A. It was.

Q. And what did that other man look like, can you tell us?

A. Well, he was quite a heavy-set man. He had kind of a, well, I would say pink colored hair.

Q. And what name did he give you?

A. J. F. Brennan.

Q. And that document that you have identified reflects the transactions that you had with the man that identified himself as J. F. Brennan, is that right? A. Yes, sir. J. F. Brennan.

Mr. Schnacke: I will ask that that be received in evidence as Government's exhibit next in order.

Mr. Gladstein: I object to it as hearsay; incompetent, irrelevant and immaterial. And, Your

(Testimony of E. M. Spencer.)

Honor, I suppose the prosecuting attorney intends to offer that in evidence as to defendant Coleman, I assume.

Mr. Schnacke: We will offer it as to defendant Coleman, at this time, Your Honor.

The Court: All right, admitted.

(Thereupon paper referred to above was admitted into evidence and marked Government's Exhibit No. 110, as to defendant Coleman only.)

Mr. Schnacke: Q. Mr. Spencer, in what type of conveyance did Mr. Brennan and Mr. Coleman arrive at your property? Did they walk or did they drive? [482]

A. They arrived in a Hudson car.

Q. And do you recall the license number of the car? A. I do not.

Q. Do you remember in what state it was registered? A. St. Louis, Missouri.

Q. It was a Missouri license? A. Yes, sir.

Q. And a Hudson automobile?

A. Yes, sir.

Q. Do you recall anything more about the automobile than that?

A. Well, as to color.

Q. What color was it?

A. It was a blue. Light blue.

Q. I see. Government's Exhibit 110, the slip to which you referred, is dated August 10, 1953, in the name of J. F. Brennan; address, St. Louis, Missouri. It shows "One cabin, $15.00. One boat $9.00",

(Testimony of E. M. Spencer.)

and an amount of $20.00 following that. What does that $20.00 represent, Mr. Spencer?

A. That was the advance given the night they arrived.

Q. I see. So the amount in the second column will be payments they made to you?

A. Total payments.

Q. And in this first column are the amount of charges? A. That's right.

Q. Then you determine from this that they arrived on August 10th? [483] And can you tell me from that what time they left?

A. They left on the 17th.

Q. They left on the 17th?

A. They checked out on the 17th and left on the morning of the 18th.

Q. There is something on here that says "3 sock."

A. That is just a record of the fish caught for the benefit of the game warden.

Q. Oh, those are sockeye salmon, is that right?

A. Yes.

Q. And there is a reference to some gasoline. They bought that from you, too?

A. Yes, that is right.

Q. Now, sir, I show you Government's Exhibits 2 and 3, and ask you if you can identify those as being either of or any of the persons that stayed at your cabin? A. I do.

Q. Are those photographs of the man who identified himself to you as J. F. Brennan?

(Testimony of E. M. Spencer.)

A. They are.

Q. I don't know if I made this clear or not: were Coleman and Brennan together when they arrived at the cabin? A. They were.

Q. And did they stay in the same cabin?

A. Yes, sir. [484]

Q. Just one cabin was rented from you?

A. That is right.

Q. And they arrived in the same automobile and departed in the same automobile, is that right?

A. That's right, sir.

Mr. Schnacke: No further questions, Mr. Spencer.

Mr. Gladstein: No questions, Your Honor.

The Court: That is all.

(Witness excused.)

Mr. Schnacke: Mr. Capozzi.

HENRY CAPOZZI

was called as a witness on behalf of the Government, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and to the Jury?

A. Henry Capozzi.

Q. Will you spell your last name?

A. C-a-p-o-z-z-i.

Direct Examination

Mr. Schnacke: Q. Mr. Capozzi, where do you reside?

(Testimony of Henry Capozzi.)

A. 3121 - 83rd Street, in Jackson Heights, New York.

Q. Jackson Heights is in the Burrough of Queens, is it? [485]

A. Queens, that's right.

Q. How long have you lived there, sir?

A. Close to 15 years. Fourteen years.

Q. I call your attention to the period immediately preceding June of 1951.

Mr. Schnacke: I will withdraw that question.

Q. You live at 3121 - 83rd Street, is that right?

A. Yes, sir.

Q. And with respect to the house, your house, where is 3123 83rd Street?

A. Right next door.

Q. Next door? What divides the two places?

A. A driveway.

Q. And do you have windows on the driveway?

A. That's right.

Q. And do you have windows at the front of your house? A. That's right.

Q. I call your attention to June of 1951. Do you know who lived in 3123 83rd Street in Jackson Heights? A. I did.

Q. Who lived there?

A. Well, on the ground floor was a man by the name of Steinberg.

Q. Steinberg? A. Sidney Steinberg. [486]

Q. Sidney Steinberg? A. That's right.

Q. Is that the Sidney Steinberg that is seated at the defendants' table?

(Testimony of Henry Capozzi.)

Mr. Gladstein: Just a moment.

Mr. Schnacke: Well, I will withdraw that question.

Mr. Schnacke: Q. Do you see the Sidney Steinberg to whom you referred in the court room, or more particularly, at the defendants' table?

A. All around the court room, do you want me to look?

Q. I asked you to look particularly at the defendants' table.

The Court: Would you recognize him?

Mr. Schnacke: Q. Would you know Sidney Steinberg if you saw him? A. I should.

The Court: Go over to the table and see if you can pick him out.

(Witness left the witness stand and approached defendants' table.)

A. The only one that fits him would be close to this fellow. The resemblance is there more.

Mr. Schnacke: Go over to the counsel table and see if you can pick him out.

Mr. Gladstein: May the record show the witness was pointing at me? [487]

The Witness: A. It resembles him, (indicating). That is the only one.

Mr. Gladstein: Let the record show the witness has come to the defendants' table and pointed out Mr. Leonard's as the only features that resembles the person referred to.

Mr. Schnacke: No further questions, Mr. Capozzi.

Mr. Gladstein: No questions, Your Honor.

(Testimony of Henry Capozzi.)

The Court: That is all.

The Witness: That is all?

(Witness excused.)

DR. ISAAC ROSENSTEIN

was called as a witness on behalf of the Government, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury?

A. Isaac Rosenstein.

Direct Examination

Mr. Schnacke: Q. What is your profession, Dr. Rosenstein? A. I am a physician.

Q. And where do you reside?

A. 847 East 13th Street, Brooklyn, New York.

Q. And where do you follow your profession?

A. At 23 West 73rd Street in New York.

Q. Do you own an apartment house, Dr. Rosenstein, on East Broadway in New York?

A. I do. 249 East Broadway.

Q. For how long have you owned that apartment house? A. For over 30 years.

Q. Did you ever live there? A. Yes, sir.

Q. What type of dwelling is that? How many families? A. Three families.

Q. A three-family dwelling?

A. Yes, sir. And office and a basement.

(Testimony of Dr. Isaac Rosenstein.)

Q. During what period of time did you live there, sir?

A. From about, I would say, from 1918 until about 1948.

Q. And then after 1948 did you live somewhere else and then return to the apartment house, or where have you lived since 1948?

A. Well, I should clarify that a little bit. I moved to Brooklyn a little over four years ago, and up until the time that I moved to Brooklyn I lived at 249 East Broadway.

Q. Well, in 1948, that 1948 date was an approximation? A. That is right.

Q. And you are now saying it was about four years ago? A. That is right.

Q. That would be about 1950? [489]

A. Around that time, yes.

Q. Could have been after or before?

A. That is right.

Q. But approximately four years ago?

A. That is correct.

Q. Now, at the time you lived there in 1950, or whenever it was, who were the tenants in that building?

A. Well, I had a Mr. Coleman living on the first floor. In 1948 I occupied the second floor. And there was a Mr. Oberstein occupying the top floor. I had my office on the parlor floor, and there was a club in the basement.

Q. The Mr. Coleman that occupied the first floor, what was his first name?

(Testimony of Dr. Isaac Rosenstein.)

A. I really forget his first name.

Q. You have forgotten? A. Yes.

Q. Do you see in the court room anyone who was residing in your house at the last time you were living there, and I will call your attention particularly to those persons sitting at the defendants' table?

A. Yes, Mr. Coleman, the gentleman—second gentleman at the end of the table from where I am sitting.

Q. To be sure——

A. (interposing) With the glasses.

Q. And what color coat is he wearing? [490]

A. The brown coat.

Q. I wanted to be sure we had the identification straight this time.

Mr. Schnacke: Let the record show that this witness identifies the defendant Coleman.

Mr. Schnacke: Q. During what period of time, sir, did Mr. Coleman live at your apartment house?

A. Since five years ago, I believe it was. About five years ago.

Q. And does he still live there?

A. As far as I know, he does.

Q. Five years ago would be about the year 1949?

A. Yes, sir.

Q. And at that time you lived there yourself?

A. Yes, sir.

Q. And you lived there, then, for about a year along with the defendant Coleman, is that right?

A. Yes, sir.

(Testimony of Dr. Isaac Rosenstein.)

Q. Did his family live there with him?

A. Yes.

Q. What does his family consist of?

A. Well, his wife—his wife's name is Edna—and two children.

Q. Since the time you have moved from the apartment house yourself, do you have occasion to visit that apartment house? [491] A. Yes, sir.

Q. And about how often do you visit it?

A. Oh, I would say from two to three times a month.

Q. Do you contact the tenants when you visit it?

A. Yes, sir.

Q. Would you tell us now during the period of time that the Coleman family has lived at the premises, which I understand to be from about 1949 to the present date, during what part of that time, to your knowledge, did the defendant Coleman live in the premises there?

A. I would say about two years or so. Maybe a little longer.

Q. He has not lived there during all the time his family has lived there?

A. Well, I haven't seen him there.

Q. And what two-year period did he live there? Did he live there when the family moved in?

A. Yes.

Q. And for how long after that did he live there?

A. A few years. I would say two years or two and one-half years.

(Testimony of Dr. Isaac Rosenstein.)

Q. Then what happened after that?

A. I just didn't see him around.

Q. And when did you first see him again after the period that you just didn't see him around?

A. I think I saw him last November once. [492]

Q. Prior to last November, when is the first previous occasion on which you had seen him, to the best of your recollection? About how long before?

A. Oh, at least several years.

Q. You can't place it any closer than that?

A. No.

Q. But it corresponded to the several years during which you did not see the defendant Coleman on the premises? A. Yes, sir.

Mr. Schnacke: No further questions.

Mr. Gladstein: No questions.

(Witness excused.) [493]

AUDREY HANSON

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. Mrs. Audrey Hanson.

Direct Examination

Mr. Schnacke: Q. Your first initial is what?

A. I have been listed as Mrs. H. B. My given name is Audrey.

(Testimony of Audrey Hanson.)

Q. So it is Audrey Hanson, is that right?

A. Yes.

Q. What is your husband's name, Mrs. Hanson?

A. Harry B.

Q. Where do you reside?

A. 1122 Plymouth Avenue, Minneapolis.

Q. Minnesota? A. Minnesota.

Q. Are you employed?

A. No, I am a housewife.

Q. You live, you say at 1122 Plymouth Avenue?

A. That is correct.

Q. Where is that house in respect to 1126 Plymouth Avenue?

A. Immediately next door. [494]

Q. Is yours a single family dwelling?

A. It is a duplex dwelling.

Q. There is one family on each floor or is there an up and downstairs for each family?

A. The second floor is occupied by a relative. We are actually one family.

Q. 1126—what type of house is that?

A. Actually that is a single dwelling, but it is a double house arrangement. The owner of the house lives in the second half of the dwelling, that is, there are two floors on each side of it. It is a double arrangement, much as a double bungalow would be constructed.

Q. There is an upstairs and downstairs on each side and there is a separate entrance to use?

A. Yes, that is right.

(Testimony of Audrey Hanson.)

Q. 1126 is one of the units and the other unit has another address?

A. Yes, 1128 would be the other.

Q. And those are in the City of Minneapolis?

A. That is right.

Q. Mrs. Hanson, how long have you lived at 1122 Plymouth? A. All my life.

Q. I will not ask you how many years that involves. Calling your attention to the period of November, 1950, do you know who lived at 1126 Plymouth Avenue? [495]

A. Mr. and Mrs. Carl Ross and their daughter.

Q. Do you see in the courtroom any of the persons who were living at 1126, and I will call your attention particularly to the defendants' table?

A. Yes, Mr. Ross.

Q. Whom do you identify as Mr. Ross?

A. The gentleman in the gray suit and the blue tie.

Q. Sitting on this side of the table?

A. Yes.

Q. And in the rear? A. Yes.

Mr. Schnacke: Let the record show that the defendant Ross was identified.

Mr. Schnacke: Q. Do you know approximately how long the Ross family has lived at 1126 Plymouth Avenue?

A. I would think it would be about six or seven years; probably 1946, approximately, I believe.

Q. About 1946 they moved in. Of what does the

(Testimony of Audrey Hanson.)

family consist? There is a Mr. and Mrs. Ross. Are there any children? A. A daughter.

Q. How old is the daughter?

A. I believe about seven.

Q. Does the family still live there?

A. Mrs. Ross and her daughter live there.

Q. When the family moved in did Mr. and Mrs. Ross and the [496] child move in?

A. To the best of my knowledge, yes. I understood there were three in the family when they moved in.

Q. Did you see all three of them around the premises after they moved in? A. Yes.

Q. On miscellaneous occasions, I take it?

A. Yes.

Q. And did all three of the persons who moved into the premises stay at the premises thereafter or was there a period that any of them was absent?

A. Well, it appeared to us that during the latter part of 1950 Mr. Ross had moved away.

Q. For how long a period did Mr. Ross appear to be absent from the premises?

A. Well, it was our impression that we saw him on one other occasion after he had left his home. We thought it was around the holidays of that year, and after that, to the best of our knowledge, at least, we didn't see him until he was captured in California.

Q. And that was—— A. In the fall.

Q. You saw him again the latter part of 1953, is that right? A. That is right. [497]

(Testimony of Audrey Hanson.)

Q. From that time back to the latter part of 1950 you say you did not see him around the premises?

A. No, I actually did not see him.

Q. Prior to the latter part of 1950 you say you had seen him around the premises?

A. Yes, I had.

Q. Approximately how often would you see him per week, would you say?

A. Well, I would say several times a week, not daily.

Q. During 1951 and 1952, and until the latter part of 1953, you did not see him at all, is that right? A. No, I did not.

Mr. Schnacke: No further questions, Mrs. Hanson.

Cross-Examination

Mr. Gladstein: Q. Were you and your husband on social and sociable terms with the Ross family?

A. I wouldn't say exactly sociable. I would have a neighborly conversation with Mrs. Ross but I never really had a conversation with Mr. Ross.

Q. You say the Ross family lived in a house that is divided into two living quarters, one of which is occupied by the owner of the house?

A. That is correct.

Q. And the Ross family rented from him? [498]

A. That is my understanding. I do not know what the arrangement is actually. I mean I am not sure he is the landlord. I just had heard that they

(Testimony of Audrey Hanson.)

di down the house, the people who lived in the other section.

Q. Who are the people who lived in the other section?

A. Mr. Charles Running and his wife and family.

Q. How long have they lived there?

A. They moved there after the Ross family moved in.

Q. Well, you have told us that the Ross family moved into the premises when?

A. I would think it was about 1946.

Q. Approximately when was it that this other family—what do you call them, Ranning?

A. Running.

Q. Running?

A. It might have been in 1947 or 1948.

Q. To the best of your knowledge and observation has the Running family occupied the premises continuously since that time? A. Yes.

Q. Of course, you took no particular note of the goings or the comings of Mr. Ross or when he seemed to be present or absent, did you?

A. No, just as a neighbor would see a next door neighbor.

Q. Do you remember after the holidays in 1951, after the [499] first of the year, seeing Mr. Ross there in the area?

A. The first part of 1951?

Q. Yes, in January after the first of the year.

A. No, I didn't see him.

(Testimony of Audrey Hanson.)

Q. Is it possible that you did?

A. Not to the best of my knowledge.

Q. You do not know whether he was there or not in that house, do you?

A. Actually I didn't see him. If he was in the house, he didn't come out in the yard or leave the house by any exit I saw from our house.

Q. Were you watching the house?

A. No, but I can see just as a neighbor would normally see his neighbor.

Q. You think you saw him in 1950, is that right?

A. That was our impression.

Q. Whose impression are you talking about?

A. I mean my family, those of us who lived in the house next door.

Q. You and your husband?

A. Specifically my mother and I.

Q. You and your mother discussed this and tried to figure out when it was that you last saw him?

A. No, I just recall that we were discussing it in our home, because we had just wondered where he was. And then we saw him. [500] After he had left the first time he returned for a short period, and then did not return after he went away the second time.

Q. Do you know when it was you and your mother were talking about this matter?

A. It was around the holidays of 1950, to the best of my memory.

Q. That is when you saw him, you say?

(Testimony of Audrey Hanson.)

A. When he returned for a short period.

Q. When was it that you and your mother were talking about this matter? Was it in 1951, 1952 or 1953? A. December, 1950.

Q. You saw him that month, didn't you?

A. We thought we saw him. I can't swear that we did at that time. We thought we saw him just come back for the holiday season.

Q. Did you and your mother discuss, or you and anybody else discuss Mr. Ross, as to whether he was there at any time after December, 1950?

A. It was discussed in the neighborhood after 1950 by neighbors who questioned where he was and asked us if we knew where he was.

Q. I asked you if you discussed it with your mother or anyone else?

A. No, we did not, unless a neighbor asked us specifically [501] what we knew. We had no interest in the Ross family at that time.

Mr. Gladstein: That is all.

Mr. Schnacke: That is all.

(Witness excused.)

JAMES MORROW

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you state your name to the Court and jury?

The Witness: James Morrow.

Direct Examination

Mr. Foster: Q. Mr. Morrow, what is your occupation? A. I am a real estate broker.

Q. Where? A. Twain Harte, California.

Q. How long have you been a real estate operator in Twain Harte?

A. Going on between six and seven years.

Q. Drawing your attention to June 20th, 1953, did you have occasion to deal in real estate or in real estate business with anyone present in this courtroom? [502] A. Yes.

Q. Who was that?

A. Mrs. Lee Kaplan.

Q. Can you point her out?

A. The young lady over there (indicating).

Q. The one on which side of the table?

A. The one with glasses on and dark hair, that young lady there.

Mr. Foster: May the record show the witness has identified the defendant Kremen.

The Court: Very well.

Mr. Foster: Q. Do you recall about what time

(Testimony of James Morrow.)

A. I would say before lunch, possibly after lunch. I have no recollection as to the exact time.

Q. Where was that? A. In my office.

Q. Was there anyone else present at that time?

A. No, sir.

Q. Will you tell us as closely as you remember what conversation you had with Mrs. Kremen on that occasion?

A. The conversation proceeds along the line of summer rental or cabin to be used for——

Q. Is this what she said to you?

A. For a quiet spot. She had a brother sick with nerves, a [503] musician, and she wanted a spot where it would be quiet and rather secluded.

Q. Did you show her any property?

A. I remember showing her, I believe, one place but it did not satisfy.

Q. Where was the first place you showed her?

A. I believe on Mark Twain Drive.

Q. Where is that?

A. That is in Twain Harte.

Q. In the town of Twain Harte itself?

A. Yes.

Q. On that day did you show her any other property?

A. I talked with the young lady and told her that I would call Mr. Germany, the gentleman who owned a cabin that was listed for sale, and see if I could arrange for a rental of the thing, and I called him and lined it up for her. She liked it. I showed it to her first.

(Testimony of James Morrow.)

Q. Did you show her that cabin?

A. Yes, I made a telephone call and they said it was okay as long as there was just a few people to go in there two or three months.

Q. Where is the Germany cabin?

A. The Germany cabin is about 1.1 mile from my office, down Little Fuller Road into a little spot that they call Brookside Court, or down at Sunnybrook, rather, and there are, oh, I [504] would say possibly 10 dwellings down in that neighborhood.

Q. Do you recall Mrs. Kremen saying anything when you showed her the Germany cabin?

A. Do I recall what, sir?

Q. Mrs. Kremen saying anything when you showed her the Germany cabin?

A. She liked it because there was a stream there and it was very quiet.

Q. Did Mrs. Kremen pay for the cabin then?

A. No.

Q. When did Mrs. Kremen pay for the cabin?

A. She said that it would be suitable, and I called Mr. Germany, and I believe on June 20th she gave me a deposit of $20 or $25. I have my records here. On June 20th she gave me a deposit of $25 for the rental of the Germany cabin for three months, and the date on my receipt is from June to September, 1953. I left the dates vacant because Mr. Germany informed me that he would be up in a day or two to take out some personal effects, and according to my records, on June 21st she took possession of the place.

(Testimony of James Morrow.)

Q. How much money did she give you on that occasion?

A. She gave me a $25 deposit, and then—that was on the 20th—and on the 25th of June she paid me $100.

Q. Looking at this book here, what are the little slips along the line here? [505]

A. These are receipts. That is a receipt.

Q. That is a carbon copy of the receipt?

A. That is the carbon copy of the receipt.

Q. What did you do with the original of that receipt? A. I gave it to Mrs. Kaplan.

Q. When was that?

A. Well, when she pays me the money, then I give her the receipt.

Q. This little list that is on the top of the receipt you added that later?

A. Yes, that was an inventory list of the——

Q. That was not in the book at the time you handed the receipt to Mrs. Kremen?

A. Oh no, I just stapled it to that sheet so I wouldn't lose it. I had it in my desk. There are some initials on there, L.K., and I didn't see those initials affixed to that list.

Q. When was the next occasion that you saw Mrs. Kremen?

A. I saw her in town, not too often. She would come in shopping and I would see her possibly once a week, maybe once in two weeks, but she was very punctual in paying the rental.

Q. How often did she pay the rental?

(Testimony of James Morrow.)

A. Every 30 days.

Q. When she came in she dropped by your place? A. Oh, yes.

Q. Did you ever see Mrs. Kremen with any other person? [506]

A. The only person that I ever saw Mrs. Kremen with was a young gentleman who was supposed to be her husband, and he is supposed to have worked down the Peninsula someplace as a furniture manufacturer or something like that.

Q. Where is your office in Twain Harte, Mr. Morrow?

A. It is right on Joaquin Gully. It is right in the middle of Twain Harte, as you go through the arch.

Q. How long is that main business district of Twain Harte?

A. It has always been there since——

Q. I do not mean in time. How long?

A. How long is the street?

Q. Yes, that is right.

A. Maybe 350, 400 feet.

Q. How many blocks?

A. Say two and a half blocks.

Q. What are the stores on the other side of the street from you?

A. We have two grocery stores in Twain Harte. We have a lumber yard, we have a doughnut shop, we have a drugstore, we have a sport shop, we have a liquor store.

(Testimony of James Morrow.)

Q. How are these stores in respect to your place? First the grocery store.

A. Mr. Lackey's store is just before you enter into Twain Harte Park proper through the arch.

The Court: He wanted to know where it was with relation [507] to your store.

The Witness: A. I am trying to line up the whole thing. Across the street from my place you have a lumber yard and a doughnut shop and a grocery store.

Mr. Foster: Q. The Lackey's store is where with reference to your place?

A. It is just before you get to my place. It is possibly 250 feet away.

Q. How is your desk situated in your office?

A. Oh, I look out the front window sort of cater-cornered. My office is a small institution. It is only 12 by 12 and there is lots of glass in there.

Q. While you are there do you look up and down the street on any occasion?

A. No, not especially.

Q. But you do look out on the street?

A. Oh, I can see.

Q. I want you, Mr. Morrow, to look in this courtroom, with particular reference to the defendants' table, and tell us whether or not you have seen any of the other persons there from your office or in any other place besides this courtroom. Why don't you get up and walk down so you can see better?

A. I have spoken to that lady (indicating).

(Testimony of James Morrow.)

Q. Which lady?

A. The one with the glasses and the black beret, or whatever [508] you call it.

Mr. Foster: May the record show the witness has identified the defendant Pat Blau.

Mr. Foster: Q. Do you recall about when it was that you saw this lady, Mrs. Blau?

A. I couldn't specifically state that.

Q. But it was during the summer?

A. When?

Q. It was during the summer?

A. Oh, yes.

Q. Do you recall where it was that you spoke to her?

A. In front of the doughnut shop. I said, "Good morning" to the lady and she spoke very cheerfully.

Mr. Foster: I would like to have this receipt marked for identification.

(The receipt referred to was thereupon marked Plaintiff's Exhibit No. 111 for identification only.)

Mr. Foster: And a list which was attached to the receipt blank.

(The list referred to above was thereupon marked Government's Exhibit No. 112 for identification only.)

Mr. Foster: Q. Mr. Morrow, did you have any other business transactions with Mrs. Kremen outside of renting that [509] cabin?

A. I issued her a fire permit.

(Testimony of James Morrow.)

Q. Showing you United States No. 86, is that the paper, the second paper down?

A. Yes, that is it.

Q. When did you issue that fire permit? Do you recall about what time of day it was, Mr. Morrow?

A. I don't think it is in this book. I will have to continue looking.

Mr. Gladstein: I didn't hear the witness.

The Witness: A. I issued this particular fire permit on July 13th, 1953. I haven't any idea as to what time of day.

Mr. Foster: Q. Do you recall where you issued it?

A. In my office. That is where I have these free campfire permits.

Q. Do you recall anything Mrs. Kremen said to you on that occasion?

A. No, the young lady did a lot of fishing and she did a lot of camping out, too, because when I met her she was just coming in from a camping trip, and she got this permit on the 13th of July.

Q. And this is your record?

A. That is my record. That is a duplicate.

Q. When a campfire permit is issued does the recipient sign it in your presence? [510]

A. Yes, they sign the original copy, because there is a few directions on the reverse side that directs them what they should do in preparing a fire, putting it out, and so forth. That is not on the duplicate copy, however.

(Testimony of James Morrow.)

Mr. Foster: I will now offer in evidence this carbon copy of a fire permit.

Mr. Gladstein: Your Honor, I make the same objection to the carbon that I previously advanced against the original, which was one of the documents concerning which we made a motion to suppress, if Your Honor please, and I take it also the offer now is limited to the defendant Mrs. Kremen.

The Court: Very well.

(Government's Exhibit No. 113 for identification only was thereupon admitted in evidence against the defendant Kremen.)

Mr. Foster: No further questions.

The Court: We will take the mid-morning recess now.

The Witness: Can I have my receipt book back?

(Recess.) [511]

Cross Examination

Mr. Gladstein: Q. Mr. Morrow, as I understand your testimony, this place at Twain Harte that was rented in June of last year belonged to a Mr. and Mrs. Germany? A. Yes, sir.

Q. Had they occupied the premises just before June of 1953?

A. Possibly 30 days previous to that.

Q. Had they been living there for some time?

A. Yes, sir.

Q. How long? A. A couple of years.

Q. Did they live there during the winter and the summer? A. Yes, sir.

(Testimony of James Morrow.)

Q. It wasn't just a cabin? It was a fully equipped house, wasn't it?

A. Yes, sir, you could call it that.

Q. When Mr. and Mrs. Germany moved out about 30 days before June of last year they put the place up with you for sale? A. Yes, sir.

Q. Then I understood from your testimony that Mrs. Kremen—you used the name Mrs. Kaplan, is that right? A. Yes, sir.

Q. Talked with you about renting the place?

A. Yes.

Q. You showed her that place. Did you do so with the idea of [512] selling it to her?

A. No, sir.

Q. But with the possible idea of renting it?

A. I tried to accommodate the parties.

Q. But you had in mind when you showed it to her that perhaps Mr. and Mrs. Germany would be willing to rent it for a while?

A. Yes, sir.

Q. And you say she liked it after you showed her the premises, so that you undertook to find out from Mr. and Mrs. Germany if they would rent it for awhile? A. Yes.

Q. As I understand it from your testimony, it is that in your conversations with Mrs. Kremen the idea was that she would take the place for a maximum of three months, is that right?

A. She says, three months, possibly three months.

Q. Then you took up with Mr. and Mrs. Ger-

(Testimony of James Morrow.)

many the question of whether they would rent it?

A. Yes.

Q. At that time there wasn't any—I take it there wasn't any figure for rent on the thing because the place was really up for sale, am I correct about that? A. That is right.

Q. You talked to Mr. and Mrs. Germany, they said, "Okay", and they set a figure? [513]

A. Yes.

Q. Then you advised Mrs. Kremen she could have it for a period of three months at a certain figure per month? A. Yes, sir.

Q. And is that the—. That is the reason, is it, for stating in the first of these receipts, that is, Plaintiff's Exhibit 111—did you say something about for three months?

A. It says, yes, June to September. We couldn't fill in the dates because Mr. Germany had some personal effects he had to take out, and they had to have two or three days to clean out their personal effects, clothing, and so forth.

Q. How much a month did that house rent for?

A. $125.00.

Q. By the way, whose writing is that in these receipts? A. Mine. I have no help.

Mr. Foster: I didn't hear the last.

Mr. Gladstein: He said he has no help.

Mr. Gladstein: Q. Now, I think you said that —you were asked if you saw anybody else besides Mrs. Kremen at those premises or in town, and you said, I think, that you saw a man on one occasion,

(Testimony of James Morrow.)

more than one occasion, that was supposed to be Mrs. Kremen's husband?

A. Oh, the day that—Mrs. Kaplan, to me.

Q. All right, you use the name you know.

A. The day Mrs. Kaplan came and got the keys after the [514] Germanys vacated the premises there was a gentleman with her purporting to be her husband.

Q. She introduced him to you as her husband?

A. She did.

Q. I want you to look at the defense table, and is it not a fact that the man she introduced as her husband was not any of the men sitting at that table? A. That is correct.

Q. And I want you to look at the photographs, Plaintiff's Exhibits 2 and 3, which purport to be the photographs of Robert Thompson. Is it not a fact that the man she introduced to you as her husband is not the man whose photograph I have just shown to you? A. That is correct.

Q. Do you know anything at all, sir, have any knowledge of any kind, to doubt that that was her husband?

A. I don't understand the question.

Q. I say, do you have any knowledge or from your observation or information of any kind that is contrary to her statement to you that that man that you saw with her when she moved in was her husband?

A. Well, they got the keys up at my office and

(Testimony of James Morrow.)

went down themselves. I didn't drive them down or go with them when they took possession.

Q. Yes, but have you ever learned or come across any [515] information that is contrary to her statement to you that that man was in fact her husband? A. I wouldn't know that.

Q. All right. Were you up at the premises after you rented them? A. Never.

Q. Did you see the man that Mrs. Kaplan introduced as her husband on just the one occasion or more than one?

A. I think possibly twice, but I think the first time—he was around there for a day or two, I am pretty sure, after they took possession, but I never saw him after that.

Q. Now, Mr. Morrow, before you came to this trial, am I right that representatives of the prosecution on at least one occasion, if not more, have showed you various photographs and asked you to state if you had ever seen any of those people before? A. That is correct.

Q. And am I right that they have showed you photographs of people that were the defendants in this case?

A. I see them in the courtroom now, but I didn't know whether they were defendants or not at the time the photographs were shown to me.

Q. Outside of Mrs. Kremen?

A. That's right.

Q. By the way, do you recall an occasion in Twain Harte [516] after Mrs. Kaplan moved in,

(Testimony of James Morrow.)

she came into town with her husband and you had a conversation and you bought her husband some coffee? A. Could be. I buy everybody coffee.

Q. Well, that is a good place to go when a man wants a cup of coffee, Mr. Morrow. But you don't have any recollection of that—with coffee at these prices?

A. If you were up there I would buy you a cup of coffee, Mr. Gladstein.

Q. All right, Mr. Morrow. Did you ever say to anybody before you took the witness stand here today you had ever previously seen and talked with the lady here at the table that you singled out earlier today?

A. You mean that young lady there (indicating)?

Q. I don't mean the lady you know as Mrs. Kaplan. I mean the other lady. Did you ever tell anybody before you came in here today you had talked to her?

A. I have seen her in town.

Q. Did you ever tell that to anybody?

A. Why, sure.

Q. When?

A. I don't know. Maybe the last time I was down, Mr. Gladstein.

Q. Did you say you had——

A. (Interposing) Wasn't I in this courtroom here a couple [517] of weeks ago today?

Q. Well, if you don't know whether you were or not in the courtroom—. Don't you know?

(Testimony of James Morrow.)

A. Sure.

Q. I am asking you, to whom did you ever make the statement before you took the stand today that you saw the lady you picked out as Mrs. Blau-in Twain Harte?

A. I told the prosecution that. They asked me.

Q. When?

A. Oh, possibly two months ago, three months ago.

Q. Well, when was the first time that you ever said that?

A. They asked me that, Mr. Gladstein.

The Court: Mr. Witness, don't argue. It takes too much time. Just answer the questions.

A. Let's see, like——

The Court: When was it?

A. Let's see, September or October.

Mr. Gladstein: Q. They asked you that?

A. Yes.

Q. They showed you a lot of photographs?

A. Yes.

Q. And you picked out Mrs. Kaplan and the other woman, is that correct?

A. That is correct.

Q. You didn't pick out any of the men, is that right? [518]

A. Yes, there was one picture I picked out that needed a mustache.

Q. Needed a mustache?

A. And that was the facial features and so on, of the man that was purported to be Mrs. Kap-

(Testimony of James Morrow.)

lan's husband. They showed me a photograph and I picked that out.

Q. And that was a man different from any of the defendants here and from Mr. Thompson?

A. Correct.

Q. All right; you say in September or October of last year you picked out a photograph of Mrs. Patricia Blau and told them you knew that woman?

A. I didn't know her. I saw her.

Q. You told them you saw her? A. Yes.

Q. Did you tell them when you saw her?

A. I couldn't give any specific day.

Q. Did you tell them when you saw her?

A. Oh, no.

Q. Did they ask you when you had seen her?

A. Sure.

Q. And what did you say to them?

A. Well, I mean time in the mountains, a day or two doesn't mean anything up there. We are not so punctual like you are in the city. We speak to everybody, and we are cheerful to [519] *to* everybody, and I saw that lady once or twice coming out of West Falls' when I got for coffee.

Q. Coming out of West Falls? Is that the coffee shop? A. No, the grocery store.

Q. Did you see her once or more than once?

A. I would say two or three times.

Q. And on each of these occasions was she coming out of the same place?

A. No, I saw her out on the street. She could

(Testimony of James Morrow.)

have been coming out of the Doughnut shop or the grocery store.

Q. Are they near to each other?

A. They are right next to each other.

Q. Do you remember—. Let's take the first of those two or three days. By the way, could you have seen her more than two or three times?

A. I wouldn't say so.

Q. You would say now, to the best of your recollection, it was two or three times?

A. Could be.

Q. Well, what was it?

A. Well, I make it a habit, Mr. Gladstein,——

The Court: (interposing) No, no, no, don't. It takes too much time. We have to get through with this testimony. The question was, is that your best recollection? A. Yes. [520]

The Court: Yes or no?

A. Yes.

Mr. Gladstein: Q. All right, Mr. Morrow, give us your best recollection approximately when it was that you saw Mrs. Blau the first time.

A. That I couldn't recollect.

Q. What year was it in? A. 1953.

Q. And what part of the year?

A. Late summer.

Q. What month, if you know?

A. Oh, I would say August.

Q. What part of August?

A. Maybe the middle.

(Testimony of James Morrow.)

Q. Is there anything that helps you fix that or are you just guessing?

A. Oh, I tell you the thing that helps me fix that, Mr. Gladstein, a very short time after I saw that lady, just spoke to her—I never talked to Mrs. Blau—the FBI came to me and asked me to recognize a set of keys.

Mr. Gladstein: May I have that answer again?

(Answer read by the Reporter.)

Mr. Gladstein: Q. What do the keys have to do with helping you fix the time when you first saw Mrs. Blau?

A. That is very easily explained. If you were presented [521] with a picture of somebody you had just spoken to on two or three occasions, and it was a big case or something that was very important in the lives of people, you would fix it that way.

Q. Did you tell the FBI man you had seen her about the 15th of August?

A. Could be, yes.

Q. Don't you know what you told him?

A. I tell the truth. I could be,——

Mr. Gladstein: I move to strike that, if Your Honor please.

Mr. Gladstein: Q. You understand, Mr. Morrow, we are trying to get the facts.

A. That is correct.

Q. Nobody is attempting——

The Court: Now, don't you make speeches to the witness.

(Testimony of James Morrow.)

Mr. Gladstein: All right, Your Honor.

The Court: Let's get on with the examination. Ask the next question.

Mr. Gladstein: Q. Do you keep your business open up there on Sundays? A. Yes.

Q. Do you know what day of the week it was when you saw Mrs. Blau up there?

A. I couldn't say.

Q. Do you know whether it was a week day or a Sunday you [522] saw her the first time?

A. That I couldn't say.

Q. Do you know what day of the week it was when you saw her the second time?

A. No, sir.

Q. Or the third time? A. No, sir.

Q. Do you know how far apart, approximately, these occasions were when you saw her?

A. Pretty close together.

Q. Well, tell us what it was.

A. I think it was just about every day.

Q. Three successive days?

A. Could be, yes.

Q. Well, was it?

A. Could have been. I am not positive. I didn't put it in a diary.

Q. Well——

A. That wasn't pertinent to me at the time.

Q. One or more of those three days would have been a week day, isn't that right?

A. Could be, yes.

(Testimony of James Morrow.)

Q. Could it be possible all three of them were week days? A. Yes.

Q. Is the grocery store open on Sundays there?

A. Yes.

Q. Is the doughnut shop open on Sundays there? A. Yes, sir.

Q. Give us the approximate time of day? I don't mean 10:35 or anything like that, but tell us, was it before noon or after, a very early hour of the day or a very late hour of the day on the first occasion?

A. Perhaps the middle of the day.

Q. On each occasion?

A. I don't open my office until 10 or 10:30.

Q. Oh. So that on each occasion it would have had to be after 10 o'clock in the morning?

A. Yes, sir.

Q. What time do you close your office then?

A. I have no regular hours because I am governed according to the work I have to perform.

Q. Do you remember in around the middle of August of last year the times when you closed your office?

A. You can't go on that, Mr. Gladstein.

The Court: If you don't know, say so. You can save yourself a lot of time if you will say so. Don't make speeches.

Mr. Gladstein: Q. Would you answer the question, Mr. Morrow?

The Court: Do you remember or not?

(Testimony of James Morrow.)

A. I don't remember what time I closed my office.

Mr. Gladstein: Q. Mr. Morrow, how was Mrs. Blau dressed the first time you saw her?

A. Sport clothes.

Q. Sport clothes? Can you tell us what you remember about them?

A. They all wear sport clothes.

Q. Can you tell us what you remember about the sport clothes that Mrs. Blau wore when you first saw her?

A. She is a very attractive woman in sport clothes.

The Court: Mr. Witness, you just answer the questions, and if you don't remember, you say so, but don't make any comments about it. Have you any recollection of what she had on, yes, or no?

A. Shorts.

The Court: Anything else beyond that?

A. Well, she would have a shirt on.

Mr. Gladstein: Q. Well, did she?

A. Sure.

Q. Anything else you can recall?

A. That is all.

Q. Now, do you recall if she was alone or with anybody else? A. Alone.

Q. On each of the times when you saw her?

A. Yes, sir.

Q. And on how many different occasions did you speak to her? [525]

A. I speak to everybody, Mr. Gladstein.

The Court: There you go again. How many

(Testimony of James Morrow.)

times did you speak to her, to the best of your recollection?

A. Every time I saw her.

Mr. Gladstein: Q. What did you say to her and what did she say to you on the first occasion?

A. My greeting is that, it is a beautiful day.

Q. Is that what you said?

A. I saw that to everybody.

Q. What did she say to you?

A. She agreed and then she walked on.

Q. What conversation did you have the second time? A. I just speak to people.

Q. What conversation did you have with Mrs. Blau the second time?

A. We didn't have conversations.

Q. What did you say to her?

A. "How do you do?"

Q. What did she say to you?

A. "How do you do", and she went on her way.

Q. What conversation did you have the third time? A. Same thing.

Q. Same thing as what?

A. "How do you do?" Just a greeting.

Q. Mr. Morrow, are you making these things up?

A. No, sir. I speak to everybody. It is my business to do so.

Q. Mr. Morrow, I am not interested in "everybody" that you speak to. I am only interested in whether you spoke to Mrs. Blau, and what you said. Did you say those things to her at Twain Harte? A. Yes, sir.

(Testimony of James Morrow.)

Q. Did she say them to you? A. Yes.

Q. On three occasions?

A. Just "Hello", and that's all.

Q. How was she dressed the second time?

A. She could be in slacks.

Q. Well, was she or not?

A. I don't remember distinctly.

Q. The first time she was in shorts and the second time she was in slacks.

A. I wouldn't say she was in shorts the first time.

Q. Isn't that what you said?

A. Wouldn't have to be the first time. Could have been the last time I saw her.

Q. Did you understand me when I asked you what she was wearing the first time, and did you say she was wearing shorts?

A. That could be the second or third.

Q. What was she wearing the third time? [527]

A. Clothes.

Q. What kind of clothes? A. Clothes.

Q. Do you know? A. Neither does she.

Q. Do you know what she was wearing the first time you saw her? A. Clothes.

Q. What kind of clothes?

A. I wouldn't know that.

Q. Then you don't know what she was wearing the first time, is that correct? A. No, sir.

Q. Is that right? A. That is correct.

Q. And you don't know what she was wearing the second time, do you? A. No, sir.

(Testimony of James Morrow.)

Q. And you don't know what she was wearing the third time, do you?

A. No, sir, but I saw the lady.

Q. Now, was anything else said but "Hello" on any of these occasions? A. No, sir.

Q. Other than what you have just told us?

A. No, sir. I had no business dealings with her whatsoever. [528]

Q. You said that you saw the lady.

The Court: Now, I am going to stop you. You are repeating Mr. Gladstein. You are going over the same, identical questions a number of times.

Mr. Gladstein: It was preliminary to another question, but I will withdraw it, Your Honor.

The Court: All right.

Mr. Gladstein: Q. All right, you have told us that an FBI man came to you to show you some keys? A. He did.

Q. And there was something about that observation that connects this up in your mind with having seen Mrs. Blau, is that right?

A. No, I didn't—I know that when the FBI man came with the keys, then a very short time later they came with pictures, and certain of them I can recognize and certain of them I couldn't, because it happened right at that time.

Q. Tell us—. Go ahead. I don't want to interrupt you. A. That is all.

Q. Tell us when it was that the FBI first contacted you with regard to identifying any of these people that you have been asked here to identify?

(Testimony of James Morrow.)

A. The very next day after they went down and raided the Germany place.

Q. And that day has been established here as August 27th. [529] Your testimony is then, that on the 28th of August, is that right?

A. Now, the day following the raid on the Germany place that they brought me the keys to recognize, and I knew they were the Germany keys, and they asked me if I could recognize anybody from the photographs.

Q. That was the day after?

A. That was the 28th.

Q. All right. And who did you say you could recognize?

A. Mrs. Kaplan and the other young lady, that is the only two I had seen.

Q. You said at that time you could recognize the other young lady? A. That is right.

Q. And you mean by the other lady Mrs. Blau?

A. Yes. I had just seen her previous.

Q. I see. You said that to the FBI man?

A. Yes.

Q. Who was the man or who were the men who came to get that statement?

A. I believe one of them was Mr. Dunker from Modesto.

Q. Mr. who?

A. Dunker. He had some other gentleman with him. Erickson. I believe Erickson. Maybe not Erickson. But I have met those boys after that. But I know Mr. Dunker was there. [530]

(Testimony of James Morrow.)

Q. Would you recognize Mr. Erickson again if you saw him? A. Maybe.

Q. Is this the man sitting here at the table?

A. Could be.

Q. What is that?

A. That could be. But I saw Mr. Erickson just once, but Mr. Dunker came back two or three times. He came back with him.

Q. Yet you have seen Mr. Erickson once or more than once? You have seen him?

A. Yes, sir, I have seen him, but I don't have to know the name.

Q. You have talked to him as Mr. Erickson?

A. Sure. I have met a lot of them.

Q. But looking at Mr. Erickson here at the counsel table, you are not able to say that is Mr. Erickson?

A. Sure, that would be Erickson. I have seen that gentleman before.

Q. Did you ever know the name of Erickson?

A. Well, Mr. Dunker, the gentleman from Modesto, had me get out my inventory list, and we went down and went over the inventory——

The Court: That is not responsive to the question. I am going to shut off the cross examination unless you stick to the cross examination, counsel. This witness is inclined to make voluntary statements, and I am not going to hold court [531] indefinitely with this witness on the stand.

Read the last question to the witness and get him to answer the question. The last question was

(Testimony of James Morrow.)

whether you recognized Mr. Erickson, the gentleman there, as an FBI agent that you saw before?

A. Yes, I recognize that gentleman.

Mr. Gladstein: Q. Now, Mr. Morrow, I would like to get, to the best of your recollection, the earliest possible date on which you say you saw Mrs. Blau at Twain Harte?

The Court: You needn't answer that question. It has been asked and answered a half dozen times.

Mr. Gladstein: Your Honor, may I be heard?

The Court: No. I am not going to let you persist in asking the same questions over and over again. You can conduct as much examination as you want, but I am not going to have the witness required to answer the same question several times.

Mr. Gladstein: Q. On how many different occasions did the FBI show you photographs of Mrs. Blau? A. Once.

Q. Just the once?

A. (Nodding in the affirmative.)

Q. On that occasion, the day after the 27th—August 28th?

A. No, I would say that would be possibly a week after the 27th.

Q. Didn't you tell us a while ago—— [532]

A. (interposing) I saw pictures of Mrs. Kremen the very next day and some of the gentlemen that are sitting around the defendants' table, but the only one I could recognize at that time was Mrs. Kaplan or Kremen.

Q. That was the 28th? A. Yes.

(Testimony of James Morrow.)

Q. Didn't you say a moment ago you picked out two photographs on that occasion?

A. Sure. Two that I know I know.

Q. Didn't you testify that on August 28th you picked out photographs of two different people, namely, Mrs. Kaplan and Mrs. Blau?

A. Mrs. Blau's picture didn't have to be in that group on that day because I don't remember specifically that that was the date.

Q. I asked you before if that was the date, when was the date, and didn't you tell us it was August 28th?

A. I went down—. Yes, on August 28th I was presented photographs to look at. Whether Mrs. Blau's picture was in that group or not, I have no recollection of saying yes or no.

Q. You don't remember my asking you within the last ten minutes you said it was August 28th you picked out Mrs. Blau's picture, is that right?

A. I know Mrs. Blau's picture when I see it, and I saw the lady there, but the specific date I can't give you. I haven't [533] kept records of those things. My dealings was with Mrs. Kaplan.

Q. My question to you, Mr. Morrow is this: Don't you remember within the last ten or fifteen minutes testifying before this jury that on the first occasion that you were shown pictures by the FBI, namely, the day after the raid, which has been established as August 27th, you picked out a picture of Mrs. Kaplan and a picture of Mrs. Blau?

A. That is correct.

(Testimony of James Morrow.)

Q. Did that happen?

A. Yes, that is correct.

Q. Just a moment ago you told us that the picture of Mrs. Blau wasn't given to you to identify——

Mr. Foster: (interposing) I object to that as argumentative.

Mr. Gladstein: May I complete my question?

Mr. Gladstein: Q. Just a moment ago you told this jury that it wasn't on August 28th you were given a picture of Mrs. Blau to identify, but about a week later? Didn't you say that?

A. I saw pictures on one of those occasions.

Q. Of Mrs. Blau?

A. Of the whole group.

Q. I am asking you only about Mrs. Blau, Mr. Morrow. On how many occasions did they show you pictures of Mrs. Blau? [534]

A. Could be twice.

Q. You mean August 28th and maybe a week later? A. Sure.

Q. Is that your testimony?

A. Because the only——

The Court: Don't give the reasons. You will get off the witness stand that much sooner if you will just say yes or no. How many times, to the best of your recollection, did you see pictures of Mrs. Blau? A. Twice.

The Court: All right; ask the next question.

Mr. Gladstein: Q. When you came down here a couple of weeks ago—you remember you men-

(Testimony of James Morrow.)

tioned a while ago you came to this court a couple of weeks ago? A. Yes.

Q. On that occasion did you have a conversation with Mr. Foster or Mr. Schnacke or another representative of the prosecution?

A. I talked with them and with you also.

Q. You talked with me, and you were on the witness stand, weren't you?

A. Yes, sir. [535]

Q. Now, I am asking you if you had a conversation outside the courtroom with any representative of the prosecution? A. No, sir.

Q. You were not in their office?

A. I was in their office but we did not talk about the case at all. We were talking about snow on the mountains and the rain, because I came down in a terrific storm.

Q. Were you talking at all about any of the defendants in the case? A. No, sir.

Q. Were there any photographs shown to you?

A. No, sir.

Q. Before you took the witness stand this morning were you shown any photographs?

A. No, sir.

Q. None whatever?

A. None whatever.

Q. Did you tell Mr. Foster before you took the witness stand that you were going to identify Mrs. Kaplan as a person with whom you had dealt? You did, didn't you?

A. I know Mrs. Kaplan.

(Testimony of James Morrow.)

Q. I say did you tell Mr. Foster before you took the stand that you were going to identify Mrs. Kaplan?

The Court: He couldn't say that because he did not know whether he was going to be asked that.

The Witness: A. No, I didn't.

The Court: It might well be—this witness seems to take charge of the proceedings, but I do not think to that extent.

Mr. Gladstein: Q. Mr. Morrow, did Mr. Foster tell you before he put you on the witness stand that he was going to ask you to identify Mrs. Kaplan?

A. No.

Q. Did anybody ever tell you before you took the witness stand that you were going to be asked to identify Mrs. Kremen, the defendant here, as the Mrs. Kaplan that you leased that cabin to?

A. No.

Q. Did Mr. Foster tell you before you took the stand that he was going to ask you if you identify Patricia Blau?

A. Not that I can recollect.

Q. Did anybody ever tell you that?

A. No.

Q. When you say not that you can recollect you mean that you are not sure but what somebody did or did not tell you that?

A. No, sir, I am quite sure that nobody did.

Q. Did you tell anybody before you took the witness stand that it was no good showing you any of the men in the case because you did not recollect

(Testimony of James Morrow.)

ever seeing any of them? Do you recollect saying anything like that to anybody? [537]

A. No, I don't know those gentlemen.

Q. When you saw Mrs. Blau the first time at Twain Harte do you remember anything about her special appearance? A. Not especially.

Q. Take a look at her now.

A. She didn't wear glasses.

Q. She didn't wear glasses? A. No, sir.

Q. On any of the occasions you saw her?

A. No, sir.

Q. Is there anything else about her that you can see as you look at her right now?

A. Sure, she has a very cheerful face.

Q. Was that different or did you notice that in particular?

A. I noticed that in particular.

Q. You noticed that she had a cheerful face?

A. Yes.

Q. Is there anything else now that you focus your attention on her that you can tell us about as to whether you noticed it at the time you saw her? A. She is nice to look at.

Q. Did you notice that? A. Yes, sir.

Q. Did you notice anything besides the fact that she was not wearing spectacles? [538]

A. She looked just like she did now, only with sports clothes.

Q. She does? A. Yes, sir.

Q. Was her hair combed the same way?

A. They don't have the same hair-do in the

(Testimony of James Morrow.)

mountains that they do in the city. They don't them up as well. But she is always a well-kept woman and looks very nice.

Q. Who is?

A. Mrs. Blau, always neat appearing.

Q. Everytime you saw her? A. Yes.

Q. And you saw her on a lot of occasions, didn't you?

A. Correct. In other words, some people are slouchy and others are very pert and neat, and she is pert and neat.

Q. Let us come back to the question, sir. What was the appearance of her hair? The same as or different from the way you now see it?

A. It could be a little different.

Q. Could. Was it different?

A. I wouldn't know that.

Q. Was it blond? A. I would say yes.

Q. You would say her hair was blond on those occasions?

A. Yes, I would say she had a rinse.

Q. You see that she has gray hair and is a brunette now? [539] A. Yes.

Q. Your testimony is when you saw her on those occasions at Twain Harte her hair was blond?

A. I didn't say it was blond. I would say that it is lighter than it is now.

Q. It had a rinse? A. Yes.

Q. It had a blond appearance? A. Yes.

Q. At least that is the way the lady looked to you that you now identify as Patricia Blau?

(Testimony of James Morrow.)

A. Sure.

Q. Did you ever tell any representative of the F.B.I., when you saw Mrs. Blau up there her hair seemed to be blond?

A. Not that I know of.

Q. Did they ask you, any of them, Mr. Foster, Mr. Schnacke or any of the representatives of the F.B.I., if the photograph that they were showing you was a good representation of the lady you saw up there that you identify as Mrs. Blau?

A. No, sir, they didn't say that.

Q. In the photograph or photographs that they showed you of Mrs. Blau how was her hair there? Was it blond or was it like you see it now, brunette with gray?

A. Well, I saw two pictures of her, a front view and a side view, and I didn't pay any particular attention to the color of [540] her hair, not in the photograph.

Q. I beg your pardon?

A. Not in the photograph.

Q. Did the photographs show her with glasses on?

A. That I couldn't remember either, but I know that when I show her she didn't have glasses.

Q. How long on the first occasion did you actually have her under observation, would you say?

A. Ten seconds.

Q. Ten seconds? A. Just passed.

Q. Did you observe where she went?

A. No, sir.

(Testimony of James Morrow.)

Q. Did you observe whether she went to an automobile? A. No, sir.

Q. Did you actually see her come out of another store——

A. There were cars parked in front of the doughnut shop in West Falls, and there always is, and you have to sort of stumble through where they are parked. It is not like walking down the sidewalk or anything like that. In fact, the first time I nearly bumped into Mrs. Blau. That is the reason I had to speak to her and be cheerful to her, because I was stumbling along to the coffee shop trying to get over the grates.

Q. You now remember you almost bumped into her? [541]

A. It was close quarters. I remember the first time I spoke to her, I spoke to her and just said it was a beautiful day and went into the coffee shop.

Q. And that occasion was when you noticed she was not wearing glasses and you noticed her hair was blond? A. She was nice looking.

Q. There are lots of nice looking women.

The Court: Mr. Gladstein, you get that answer because you ask the same question over again. I will offer you five minutes more to cross-examine this witness, exercising the discretion of the Court, because I feel you have repeated the same question many times and there has to be some limit to the extent of the cross-examination.

Mr. Gladstein: Do you want to give me a moment?

(Testimony of James Morrow.)

The Court: Is there some particular exhibit you want?

Mr. Gladstein: I thought there were photographs. I am now told I am mistaken about it. Mr. Foster tells me I was in error about it. I would like to ask the Court to permit me to resume my examination of this witness at 2:00 o'clock.

The Court: I do not think so, Mr. Gladstein. If I felt there was any basis for it, I would, of course, extend the time, but the questions have become repetitious and the area of examination is an extremely limited one by reason of the direct examination. I think you should conclude your examination so we can proceed with the trial. [542]

Mr. Gladstein: Will Your Honor permit me in the absence of the jury to state my reasons?

The Court: If you have some other subject matter of cross-examination you may proceed.

Mr. Gladstein: I wanted to state to the Court my reasons for having further examination, which I would not want to disclose in the presence of the present witness, and I think Your Honor would appreciate the purpose and the motivation of that representation on my part.

The Court: My opinion and conclusion is the cross-examination of the witness has come to the point of badgering, and when that time arrives in a court of justice it is the duty of the Judge to stop it. That is my ruling. You can ask further questions if you wish to, for the limited period I have suggested.

(Testimony of James Morrow.)

Mr. Leonard: If Your Honor please, for the record, may I cite Your Honor's last observation, that the cross-examination was badgering, as misconduct occurring in the presence of the jury, and I move for a mistrial.

The Court: I made the ruling and it speaks for itself. Now do you wish to ask any more questions?

Mr. Gladstein: I do, Your Honor, but I see it is past 12:00 o'clock.

The Court: You go ahead and take another five minutes, if you feel there is some subject you have not covered in the [543] cross-examination.

Mr. Gladstein: Q. In your conferences with any of the F.B.I. men or any of the prosecuting attorneys did you talk with them about Patricia Blau in any regard whatever as to looking at photographs and saying, "Did you see that woman?"

A. That is right, sir. I never talked about it.

Q. Did they talk to you about her?

A. No, sir.

Q. As to what she did? A. No, sir.

Q. Did they try to pin you down to a very particular date on which you say you saw her?

A. No, sir.

Q. Did they say anything to you about the fact that she was working in San Jose?

A. No, sir, I did not know that.

Q. Did they say anything like that?

A. No, sir.

Q. Did they ask you if you ever saw her up there in an automobile?

(Testimony of James Morrow.)

A. No, sir, they asked me if I had seen her. I had on one or two occasions and that is all.

Q. Now, the day that they came up, on August 28th, to show you some photographs that day, did you go up to the premises? I mean the Germany premises. [544]

A. Yes, sir, that is the day.

Q. Were there large crowds there?

A. No, sir, there wasn't anybody there, but when we arrived on the premises there were two men from the Union Democrat—a newspaper in Sonora—that were trying to take photographs of the building, and the boys were allowed one shot through the window from the outside.

Q. That was the 28th?

A. On the 28th. They didn't even allow them in the house.

Q. Were there people in and around the premises? A. No, sir.

Mr. Foster: Just a moment. I was going to object.

Mr. Gladstein: Q. Were there people in and around those premises during the time before these F.B.I. agents came back the second time, that is, the week after the 22nd?

Mr. Foster: I am going to object to this question as outside the scope of the direct examination.

The Court: Sustained.

Mr. Gladstein: Your Honor won't permit me to inquire as to the situation of the house after the arrests?

The Court: It is not a question, Mr. Gladstein, of my permitting you to do anything. You have asked the question on a subject matter, the attorney has objected to it on the ground it is outside the scope of the direct examination, it obviously is, and I have so ruled. [545]

Mr. Gladstein: I see that I have exhausted the five minutes Your Honor gave me. I do not want to press this under the Court's ruling. I should like to say, however, for the record, that I have not completed what I regard as a necessary cross-examination. I, of course, bow to the ruling of the Court, but I would assign it to the prejudice of my clients.

The Court: I will allow you an additional five minutes after the recess and we will see how you get along then. I do not want you to go away with an idea that Judge Goodman is a "no good" and shut you off. You will have five minutes after the recess.

Members of the jury, we will take the noon recess. I want to state to you that these colloquies on the extent of cross-examination and the rulings of the Court have nothing to do with the function which the jury performs. You only judge the evidence in the case and you are not to judge the evidence in the case on the basis of something that the Judge said or the attorneys said. That is all part of the paraphernalia of trying to move the trial along, and it does not concern the vital question of the guilt or innocence of the defendants

nor does it concern the weight which you give the testimony of the witness.

Mr. Gladstein: Will Your Honor remain a moment after dismissing the jury?

The Court: Yes. Members of the jury, please return at [546] 2:00 o'clock. The Court will remain in session.

(Thereupon the jury retired from the courtroom, and in their absence the following occurred:)

Mr. Gladstein: Your Honor, I wanted to say this. I indicated to the Court I had a particular reason for desiring additional cross-examination. I must say I felt taken aback by Your Honor's statement that you thought my examination was badgering, but I should like to place on record my reason.

I am informed, and I can only go on the information I received, that Mrs. Blau was never in Twain Harte. That is my information. If she tells me the truth, then it is obvious that the present witness is either mistaken or his testimony is in error for other reasons. But that becomes a crucial and central fact.

The Court: May I interrupt you, Mr. Gladstein? That is nothing more than the problem that attorneys are confronted with in an examination. The witness does not answer them the way they want to. Their client tells them something different. They are up against that impasse. That does not mean that a Judge should allow the attorney to keep at the witness indefinitely in the hope that some lawyers have, and I know I have had, too, when I

was a young man, that sometime or other I am going to make the witness break down and say, "I didn't tell the truth."

Mr. Gladstein: It isn't that. Your Honor knows me better [547] than that to suggest that I have that thought in my mind, too. I am interested in trying to get this witness to state as specifically and precisely as possible when he says this happened, because it is presently obvious because if he sets a time when I can prove by objective evidence that the lady was some miles and miles away working at a job, that would be a matter properly for the jury to pass upon, but if the witness is evasive, if he gives the kind of testimony that he does, then, of course, the task of the examiner becomes more difficult.

The Court: The demeanor of the witness, and so forth, is a question for the jury to determine.

Mr. Gladstein: Of course.

The Court: I could not, except to the extent that it is necessary to determine the extent of examination, make a decision in that regard. The reason why I said the questions were repetitious and you should sometime or other terminate your examination is because I do not consider that the witness is evasive. The circumstances that are stated are such that he answers that question as best he can remember. He is a loquacious witness. He is a witness who is difficult to handle. He is a witness who wants to make statements about the manner in which people conduct themselves up there in the country, but that does not make him an evasive

witness. However, I am not weighing his testimony for the purpose of credibility, [548] only for the purpose of determining the limits of cross-examination.

Mr. Gladstein: Your Honor has practically given him not only a weighing but an evaluation and a conclusion by the statement Your Honor made, which I know is not in the presence of the jury, but, Your Honor, I want to suggest that the mere fact that I was asking what to the Court seems like a repetitious question, is not in and of itself, I submit, a vice on the part of the questioner, if there is a proper motive and if there are difficulties presented by the witness.

Your Honor recognizes that the witness is, if you say, loquacious. He is certainly that, and much of the time that was taken up in the examination is attributable to the fact that his answers were not responsive.

The Court: He adds something to it.

Mr. Gladstein: All right. I do not think I should be held responsible for that trait on his part, and I simply suggest to Your Honor——

The Court: All you are telling me, Mr. Gladstein, is that your client tells you one story and the witness is telling a different story. You can't get him to change his story if you keep asking him the same questions.

Mr. Gladstein: No, Your Honor. I absolutely disclaim that that is my intention or my purpose or that such a purpose is manifested by what I am doing. I do not want to try to [549] get him to

change his story. I want to get him to pinpoint his story, so that if my client is truthful and has truthfully informed me of the fact, this witness can be shown for what he is.

The Court: You can't get him to say anything more than he is saying according to his recollection.

Mr. Gladstein: I wanted to explain to the Court what my purpose was.

The Court: I understand that. Maybe if I were —maybe I would follow some tactic myself if I were a lawyer and trying to create whatever doubt I could with respect to a witness' story. It is perfectly all right. I am not criticizing you for that. But the Court has a duty in administering a trial to move it along, and if it appears to be actually repetitious, there has to be a limit to the examination sometime. Now, if you can figure out five or ten minutes more of questions that you think are not going to be asking the same question over again, as I said to you before, you may take a little more time, but you have got to get through with this examination sometime.

(Whereupon an adjournment was taken to the hour of 2:00 p.m. this date.) [550]

JAMES MORROW

resumed the stand as a witness on behalf of the Government, and having been previously sworn to tell the truth, the whole truth and nothing but the truth, testified further as follows:

Cross-Examination—(Continued)

Mr. Gladstein: Q. Mr. Morrow, you told us that the F.B.I. spoke to you about some keys the first time they saw you. What keys were those?

A. To the cabin.

Q. They just wanted you to identify them, is that it?

A. Yes, there was a tag on them.

Q. You have mentioned in your testimony a place called Westfalls' grocery place.

A. Yes.

Q. Do you know a man named Vita or Vita Westfall?

A. She is the wife of the owner.

Q. Did you ever have a conversation with her concerning Patricia Blau?

A. Not to my recollection.

Q. Did you talk with her about whether or not you had ever seen Mrs. Blau there at Twain Harte?

A. I could.

Q. The question is did you?

A. I presume so, yes.

Q. Did you talk to her as to whether or not Patricia Blau had ever been in her place of business?

(Testimony of James Morrow.)

A. I don't remember talking about whether she had been in her place of business.

Q. Did you ever talk to Mrs.—it is Mrs. Westfall, is it? A. Yes.

Q. Did you ever talk to Mrs. Westfall about the appearance of Mrs. Blau there at Twain Harte at any time?

A. I might have said that she appeared a very charming woman, yes.

Q. Do you recall who brought the subject up, you or Mrs. Westfall, as to whether or not Mrs. Blau was ever there?

A. That I don't know, no, sir.

Q. Did anybody speak to you about whether or not Mrs. Blau had been in the grocery store of Mrs. Westfall to negotiate a check?

A. No, sir, not that I know of.

Q. Did you ever discuss that with Mrs. Westfall? A. No, sir.

Q. Or with Mr. Westfall? A. No, sir.

Q. Or with any representative of the prosecution? [552]

A. I didn't know she wanted to cash a check. That is news to me.

Q. You never discussed that with anybody?

A. No, sir.

Q. Did you ever see Mrs. Blau at Mrs. Westfalls' place at anytime?

A. No, sir; the only time I ever saw Mrs. Blau was out in front of either the doughnut shop— it

(Testimony of James Morrow.)

just happens that that is where I seen the lady to speak to her.

Q. On or about the 20th of August—the 20th of August would be a week to the day before the F.B.I. agents went up to this house and arrested the people who were there—did you see Mrs. Blau in Twain Harte on that day?

A. I couldn't name any specific date, whether it was the 20th or the 19th or the 21st.

Q. To the best of your recollection was it before the 20th or after that you saw Mrs. Blau on any occasion?

A. I couldn't give you a direct answer on that. I wouldn't know whether it was just before or after.

Q. Do you know whether it was in the middle of August or some other month?

A. It was August.

Q. Do you know that it was after the 15th of August? A. I would say so.

Q. Mr. Morrow, did you have some conversation with any agent [553] of the F.B.I. about a week before the raid?

A. I never saw them, Mr. Gladstein, until the day——

The Court: Just answer the question.

The Witness: A. No, I never saw them.

Mr. Gladstein: Q. Did you ever tell anybody that the F.B.I. had consulted with you about this matter a week before the raid? A. No, sir.

Q. Did you ever discuss with any law enforce-

(Testimony of James Morrow.)

ment official, F.B.I. or otherwise, anything concerning the people up there? A. No, sir.

Q. Prior to the raid? A. No, sir.

Mr. Gladstein: If Your Honor please, the remainder of my questions would be, I guess one might call them, repetitious. They would cover somewhat the same ground that I had previously asked the witness about. I do not wish to offend the Court or violate the Court's rule——

The Court: You do not offend me. I am hard-boiled, tough-skinned.

Mr. Gladstein: My point is, Your Honor has told me you did not want me to ask repetitious questions.

The Court: If you ask repetitious questions I think the Court would not permit the cross examination to proceed any further. There is no point to that. I do not know what you [554] are going to ask.

Mr. Gladstein: That is why I am telling you.

The Court: If you tell me you are going to ask repetitious questions, my answer is no.

Mr. Gladstein: That is my request to the Court, that I may have the opportunity to examine the witness again on the ground I examined him about this morning, and I think it would not be proper for me to say my purpose in front of the jury or the witness, but I should like at some point to apprise the Court of my purpose.

The Court: You did that in the absence of the jury.

(Testimony of James Morrow.)

Mr. Gladstein: That would be the remainder of my cross examination.

The Court: Any further questions?

Mr. Foster: Just one or two.

Redirect Examination

Mr. Foster: Q. Was there anything in particular about Mrs. Blau that caused you to remember her, Mr. Morrow?

A. As I previously stated, I speak to everybody that I see, and she was a very nice appearing woman and a pleasant woman to talk to.

Q. In other words, the reason you remember her is because she is a nice looking girl?

A. Not only that, but cheerful and very nice to say "hello" to. [555]

Mr. Foster: That will be all the questions. If Your Honor please, at this time I would like to offer——

The Court: Are you through with the witness?

Mr. Foster: Yes.

(Witness excused.)

Mr. Foster: Exhibit No. 111, which has previously been marked for identification, in evidence.

The Court: That is the receipt.

Mr. Gladstein: I make the same objection to these that has been made already to the originals, if Your Honor please, that it is merely an effort to supply the same information that the originals would have supplied, and therefore my objection is taken to the originals, the exact number of

(Testimony of James Morrow.)

which I do not have in mind, but it is a matter of record. I renew those same objections to this.

The Court: Admitted as to the defendant Blau.

Mr. Gladstein: This is not the defendant Blau, if Your Honor please.

The Court: I mean the defendant Kremen. Excuse me.

(Whereupon Government's Exhibit No. 111 for identification only was thereupon received in evidence as to the defendant Kremen.)

Mr. Foster: Exhibit No. 111 is merely a carbon copy of the receipt,

"Received from Mrs. Lee Kaplan, address 1244 [556] Lick Avenue, San Jose, $25 for rent of Germany cabin for three months, June to September, 1953."

And signed by James Morrow.

Mr. Charles Germany.

CHARLES E. GERMANY

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and jury.

A. Charles E. Germany.

Direct Examination

Mr. Foster: Q. Mr. Germany, do you own a cabin in Twain Harte? A. I do.

(Testimony of Charles E. Germany.)

Q. Could you tell us whether or not you recognize your tenants in this courtroom or any prior tenants of yours? A. Yes, I think I do.

Q. Where would they be?

A. This dark-haired lady over there and this man over here at the end of this table.

Q. When was the first occasion on which you saw these people?

A. I think it was the first part of July. I am not sure [557] about the date.

Q. On that occasion were you by yourself or with someone else?

A. My wife was with me.

Q. Where was it that you met the people?

A. At the cabin.

Q. Did you go there by foot or in an automobile? A. Automobile.

Q. Can you tell me what happened when you met these people?

A. Well, when we drove up there the man came out and so someone spoke about it being a jumping-off place. He said, "This is the end of the road." So we were invited in, and made us acquainted with the woman.

Q. Who was there at that time?

A. This dark-haired lady and the man over at the end of the table.

Q. The one on the far side of the table?

A. At my extreme right.

Mr. Foster: May the record show the witness has identified the defendant Kremen.

(Testimony of Charles E. Germany.)

Mr. Foster: Q. And who was the man, Mr. Germany?

A. I understood his name to be Newberg.

Q. In this courtroom is what I mean, Mr. Germany.

A. Oh, this man right here (indicating) the dark-haired man sitting beside the light there.

Q. What did they say to you when you went into the cabin?

A. Well, I don't remember any exact words, only that we were introduced to the woman.

Q. How did he introduce her to you?

A. He introduced her as his sister.

Q. Then what happened, Mr. Germany?

A. Well, we sat down there and we talked for a few minutes, and then they started to have breakfast and they invited us to have breakfast.

Q. Who invited you to have breakfast?

A. Mr. Steinberg, Newberg, or whatever his name is.

Q. Who was doing the cooking?

A. Mr. Steinberg.

Q. What was Miss Kremen doing?

A. She was maybe dusting the furniture or something around in the house. I don't remember.

Q. What did you do then after you finished breakfast?

A. Well, we visited a few minutes and then we went down and visited with Larsons down the hill from our place.

(Testimony of Charles E. Germany.)

Q. Did you see the people at the cabin again that day?

A. We left the car up on the hill and we walked down to the Larson's, and when we came up those two people were there playing Ping-pong, and that is the last we seen of them. We got in the car and drove away.

Q. Did you say anything to them when you saw them the last [559] time?

A. No, only I gave them a high-sign and said we would see them later or words to that effect.

Q. What did they say to you?

A. Well, I don't remember, only I said, "I don't believe I remember your name." I think, if I remember correctly, he said his name was Newberg.

Q. Is there anything in particular that makes you recall that name?

A. Well, yes, up in Oregon, Newberg, Oregon——

Mr. Gladstein: I am going to object to that as calling for the conclusion and opinion of the witness.

Mr. Foster: I will withdraw the question.

Mr. Foster: Q. This man that introduced himself to you as Newberg, that is, this man sitting over here? A. That is right.

Mr. Foster: May the record show that the witness has identified the defendant Steinberg?

Mr. Foster: Q. Now, was there another occasion on which you saw——

(Testimony of Charles E. Germany.)

A. Yes, it was possibly a month later I had gotten the second light bill. The first one had been paid, and I went up there to collect the light bill.

Q. To the Twain Harte cabin?

A. To the Twain Harte cabin. [560]

Q. Were you by yourself at this time?

A. I was alone, yes.

Q. Who was at the cabin?

A. At that time there was an extra man there.

Q. Do you recognize that man in the courtroom?

A. Yes, I do. It is the man sitting on the extreme left over at the corner of the table.

Q. Were you introduced to the man at that time?

A. Yes, but I don't recall any name.

Q. Do you recall anything that was said at that time?

A. Nothing more than when I was introduced, he said, "This is a buddy of mine."

Q. Mr. Steinberg. Can you tell us whether there was any conversation about that light bill on that occasion?

A. They were starting to make breakfast, so I sat around there until they had finished their breakfast. And I mentioned about the light bill. Mr. Steinberg motioned to the lady to pay me. And she gave me the money, and in approximately 10 or 15 minutes I got in my car and went away.

Q. And then you left? A. Yes.

Q. You mentioned this other man that was there

(Testimony of Charles E. Germany.)

on that occasion. Will you point out that man in the courtroom again?

A. That man at the corner of the table with his hand up to his face. [561]

Mr. Foster: May the record show that the witness has identified the defendant Rasi——

Mr. Gladstein: Ross.

Mr. Foster: The defendant Ross.

Mr. Gladstein: Just a question or two.

Cross Examination

Mr. Gladstein: Q. When you came to have the bill paid did you say Mrs. Kremen paid the bill to you? A. That is right.

Q. You understood she was the tenant of the place and she had rented it?

A. That is right.

Q. I noticed Mr. Foster asking you questions calls that a cabin. That house of yours has quite a number of rooms in it, doesn't it?

A. Well, it has two bedrooms, living room, dinette and kitchen.

Q. You and your wife used to live in it?

A. That is right.

Q. It was built to live in in the winter there as well as the summer?

A. Oh, yes, we put in two winters there.

Q. Two winters? A. Yes.

Q. You had the place up for sale, is that right?

A. Yes.

Q. However, you received a call from Mr. Mor-

(Testimony of Charles E. Germany.)

row saying he had a lady who wanted to have it for a few months? A. That is right.

Q. And you went along with that idea, is that right? A. That is right.

Q. Can you tell us about the road that leads up to that house, Mr. Germany? What kind of road is that?

A. Well, it is crushed rock.

Q. Crushed rock or gravel.

A. Coming off the County road there isn't much rock in the road, but the main drive on the angle up the hill to the house is crushed rock.

Q. Is that a private road or a public road?

A. Well, that is considered—the little drive up to our place is private, but the other is considered a public road that comes off the County road down to the creek.

Q. Let me ask you this: The main highway or street that goes through Twain Harte, that is a County road, is it? A. That is state highway.

Q. Twain Harte is an unincorporated town, is it? A. That is right.

Q. The road that takes off from the main highway in town and goes in the direction of your place, is that paved or crushed rock? [563]

A. Oil road.

Q. At some point that oil road leads off into a number of roads of crushed rock?

A. That is right.

Q. The one that goes up to your place, does

(Testimony of Charles E. Germany.)

that road also service other houses in the immediate vicinity?

A. There is occasionally some people across on the other hill. Three different families use it occasionally through the summer. Larson, just below us, and us, and the man that owns the property up on the hill, the County road. He uses the road quite a lot. So there is the three of us that uses it quite a lot.

Q. What is the name of that last man?

A. Harold G. Mow.

Q. He would be going by your place in getting to and from town to his place? A. No.

Q. Is there anybody who lives right near by who has occasion to use that same road and would pass right by your house?

A. No, not unless it would be some of the folks who had gone over on the other hill and the houses over there. There are about three houses on the other hill across the valley.

Q. How far is the Larson place from yours?

A. Oh, about a hundred feet, I imagine.

Q. How far is the other place—what is his name, Mow? [564] A. 150 to 200 yards.

Q. In that whole area of Twain Harte there is that about the usual distance between houses, 150 feet, 200 or something like that?

A. Well, it depends, you get out there further and they are farther apart, but this was laid out there for a subdivision where we are and it never did develop. Just a very few people built there.

(Testimony of Charles E. Germany.)

Q. And further out you say the houses are even more sparsely located? A. Yes.

Mr. Gladstein: That is all.

The Court: Is that all, Mr. Foster?

Mr. Foster: That is all.

(Witness excused.)

MICHAEL LACKEY

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. My name is Mike Lackey. [565]

Direct Examination

Mr. Foster: Q. Mr. Lickey, what is your business?

A. I have a grocery store in Twain Harte.

Q. How long have you had that store?

A. Well, I had a grocery store in Twain Harte for seven years, 16 years in Sonora.

Q. Where is your grocery store with reference to Twain Harte?

A. Well, I would say it was right in the heart of the little community of Twain Harte, right in the entrance.

Q. Mr. Lackey, I am going to ask you whether or not you see in this courtroom any of your customers or prior customers at your grocery store?

(Testimony of Michael Lackey.)

If you can't see up there, why don't you stand up?

The Court: Would you like to go down closer?

The Witness: May I?

Mr. Foster: Q. Is there anybody in this courtroom that you recognize as having purchased groceries in your store?

A. Well, the closest person that I have served groceries to would be the lady over there with the glasses.

Q. Which girl with glasses?

A. To the right there.

Q. Do you recall definitely?

A. No, I'm a little puzzled about that.

Q. This woman who resembles this girl here——

Mr. Gladstein: Just a second. I do not think that is [566] proper.

The Court: That is leading and suggestive.

Mr. Foster: What did you say, Your Honor?

The Court: Your question would be leading and suggestive.

Mr. Foster: Q. In the period of July and August do you recall filling any orders for sour cream?

A. Well, I had a lady that came to my store during the summer and she would buy fairly good sized orders of groceries. She would be by herself all the time. She was practically alone, and the early part of July this particular lady asked me to buy her some sour cream.

Q. Is that an item that you usually carry in your store? A. No, we do not.

Mr. Gladstein: Excuse me. I am sorry to in-

(Testimony of Michael Lackey.)

terrupt, but I do not see any foundation for this, if Your Honor please, sour cream or anything else. I am going to object to this as incompetent, irrelevant and immaterial.

Mr. Foster: If Your Honor please, the witness apparently is not sure of this identification.

The Court: He may be developing identification aside from personal identification. It is hard to say. I see no reason for stopping the answer now.

(Question read.)

The Witness: A. No, it is not an item that we possess in the store. Well, I haven't had it at all until this particular [567] party asked me to buy her some. I was interested because I thought sour cream was just used for several special dishes, and I tried to get closer to her, in her thoughts, what kind of dishes she used it for.

Q. This particular woman, what size orders did she purchase?

A. She got quite good sized orders, and when I would bring them out to the car there would be no family, but the orders were always large enough to feed quite a size family.

Q. When was the last occasion on which you saw this woman, approximately?

A. It was approximately at the end of August.

Q. At the time you were filling these orders were you alone in the store?

A. Was I what, sir?

Q. Were you alone in the store?

A. No, there was a clerk and a butcher and my-

(Testimony of Michael Lackey.)

self. Mostly—at the check stand I was there mostly alone.

Q. Did your wife ever help you with the store?

A. Yes.

Mr. Foster: No further questions.

Mr. Gladstein: I move that the testimony be stricken.

The Court: Mr. Reporter, will you read the testimony concerning the identification?

(Record read.)

The Court: That is a question of the weight of the [568] testimony.

Mr. Gladstein: What is Your Honor's ruling?

The Court: I said that is a question of the weight of the testimony. I will deny the motion.

Cross Examination

Mr. Gladstein: Q. Mr. Lackey, did I understand you to say it was sometime late in August that you had this order for sour cream?

A. No.

Q. That was earlier?

A. That was much earlier.

Q. These large orders that you are talking about, was that sometime in August?

A. And through July also.

Q. Do you have any copies with you of what these orders were, any records?

A. There is never,—a cash transaction is checked out through the register and we don't have any records of it. Just a moment, please. I do have

(Testimony of Michael Lackey.)

records of purchasing sour cream for this person. That is one thing she asked me to get for her and I always please my customers.

Q. All right. Aside from the sour cream do you have any records to show what it was that was purchased by this woman?

A. Well, only through my mind as a storekeeper. [569]

Q. How often did she buy from you?

A. Most of the time it would be almost twice a week.

Q. Over how long a period of time did she buy from you?

A. I would say the early part of—all through July and almost all through August.

Q. So you would have seen her probably more than a dozen times?

A. I think much more than a dozen times.

Q. You would see her as a storekeeper, a customer across the counter, is that right?

A. Especially a good customer you always take note.

Q. So you took note of her?

A. That is right.

Q. You are not sure, however, whether that lady you served is in the courtroom? Is that right?

A. No, I am not, for some reason or other.

Mr. Gladstein: That is all. [570]

(Testimony of Michael Lackey.)

Redirect Examination

Mr. Foster: Q. How was the woman dressed that was making these purchases?

A. Well, she was dressed in blue denims that had been worn for quite a while, I would say. Very short denims, like a vacationist.

Q. How did she wear her hair?

A. Well, her hair was black.

Mr. Gladstein: This is not proper redirect examination, Your Honor please, and I object to it.

Mr. Foster: If Your Honor please, I am merely questioning the witness on something Mr. Gladstein just finished talking about.

Mr. Gladstein: I don't think the cross examination was on that. Anyway, I make my objection.

The Court: Overruled.

Mr. Foster: What was the question?

(Question read by the Reporter.)

A. Well, it is pretty hard to describe, but it wasn't in curls or it wasn't in wavy set.

Mr. Foster: Q. And do you remember whether she wore a hat or a bandanna?

A. I don't think so.

Mr. Foster: No further questions.

The Court: That is all. [571]

(Witness excused.)

Mr. Foster: Mrs. Ruth Lackey.

Mr. Gladstein: Your Honor, I wish to renew the motion I made to strike the testimony of the witness Mr. Lackey. While doing so, if Your Honor is giving that consideration and wish to take it

under advisement, I wish also to make a motion to strike the testimony of the witness Henry Capozzi.

Mr. Schnacke: No objection to that, Your Honor please.

Mr. Gladstein: I understand from Mr. Foster and Mr. Schnacke they have no objection.

The Court: Yes, the testimony of Mr. Henry Capozzi may be stricken.

Mr. Gladstein: And does Your Honor wish to make a ruling on the other?

The Court: Well, I have a little doubt about it. I think I probably would tell the jury anyhow that the testimony of that witness should have very little weight, but I will reserve ruling.

RUTH LACKEY

was called as a witness on behalf of the Government, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the Jury? [572]

A. Ruth Lackey. Mrs. Michael Lackey.

Direct Examination

Mr. Foster: Q. Mrs. Lackey, what is your husband's occupation?

A. My husband is a retail grocer. We have a general store.

Q. In Twain Harte? A. In Twain Harte.

Q. And do you ever assist your husband in that grocery store?

(Testimony of Ruth Lackey.)

A. Well, I am back and forth doing all the little things he hasn't time to do, yes; his deposits and things like that, and getting the book work.

Q. During the summer of 1953 did you assist your husband in the running of this grocery store?

A. Why, yes, when he was busy I would come down and help people find things. They were usually, one or two things, if I happened to be shopping—they are mostly strangers.

Q. In looking over the courtroom, do you recall any of the people which you helped serve during the summer of 1953?

A. I should think the lady with the dark hair.

Q. Which lady?

A. The lady with the dark hair and glasses. There was a slender woman——

The Court: Do you want to go down, madam, and look a little closer? [573]

A. It probably would help. (leaving witness stand) The lady sitting at the table with the gray suit. And——

Mr. Foster: (interposing) Do you see other people there that you recognize?

A. I have seen this gentleman around, the one with the dark hair. But he didn't look like he does now. He had a mustache.

Q. Are there any other people that you recall?

A. I am not sure.

Q. Now, the woman——

Mr. Foster: May the record show that the witness has identified the defendant Kremen.

(Testimony of Ruth Lackey.)

The Court: All right.

(Witness resumed the witness stand.)

Mr. Foster: Q. Now, during the summer of 1953 can you estimate how many occasions on which you saw Mrs. Kremen?

A. Well, several times. Well, could be four or five times, coming in and out of the store, doing my shopping and she would be shopping at the same time,

Mr. Foster: And may the record also show she identified the defendant Steinberg?

The Court: All right.

Mr. Foster: Q. Can you recall when you saw this man?

A. Well, I have seen him around the square, but there was another gentleman I recognized from the pictures who evidently is—I don't see there at the table. [574]

Q. But you do recognize Mrs. Kremen?

A. Yes, very definitely.

Q. Now, do you recall ever seeing anyone with Mrs. Kremen?

A. Well, yes, there was a gentleman with a dark —sort of slender, possibly a little more than medium height, there at the store that used to wait while she was doing her shopping occasionally.

Q. Yes?

A. And one time he was over near the drug department and he was looking for something and I asked him if I could help him and he wanted some lanolin hair rinse, which is a washable dye,

(Testimony of Ruth Lackey.)

and we didn't have any at the time and I referred him to the drug store.

Q. Do you recall any specific purchases Mrs. Kremen made while you were in the store?

A. No more than just buying grocery orders, like all the other tourists.

Q. No particular item of groceries?

A. Well, Mike used to come home and say this lady was——

Mr. Gladstein: Just a moment. I move that be stricken.

Mr. Foster: No objection.

The Court: All right. It may go out.

Mr. Foster: That will be all. [575]

Cross Examination

Mr. Gladstein: Q. Mrs. Lackey——

A. Yes?

Q. If I understood you correctly, there were times when you saw Mrs. Kremen, whom you have identified here? A. Yes.

Q. Shopping at your husband's store?

A. Yes.

Q. About how many times?

A. Well, I didn't definitely keep count of them.

Q. No, I know that.

A. Well, at least several times.

Q. Several times? Well, do you mean half a dozen times? A. Yes, it might be.

Q. All you noticed about her was that she was shopping?

(Testimony of Ruth Lackey.)

A. Just buying, yes, shopping buying considerable order.

Q. Buying what?

A. Buying a fairly large order, which a grocer's wife would notice.

Q. Did you notice that?

A. Of course. If you are in business you notice things like that.

Q. You noticed that each time?

A. Well, if the person is outstanding, yes.

Q. No, I am asking, Mrs. Lackey, did you notice that each [576] time that you saw Mrs. Kremen, that she had a big order?

A. She was shopping with one of those carts and it was fairly well filled.

Q. When you observed her? A. Yes.

Q. And you mean by that a cart, one of those little go-carts that you wheel down an aisle and in which you put the things you want to buy?

A. Yes.

Q. And you said on one or more than one occasion you saw the defendant Steinberg down there with her, is that what you said?

A. No, not necessarily.

Q. Well, did you see him there? Did you see him and her together or did you just see him there?

A. Well, not—I couldn't really place them together, but he would be there sometimes at the same time that she was there.

Q. In other words, your testimony is that there were times you saw Mr. Steinberg in the store,

(Testimony of Ruth Lackey.)

too, but you don't know whether he was with Mrs. Kremen or not?

A. I couldn't say positively.

Q. But I say you do remember he was down there in the store? A. Yes.

Q. Did he seem to be shopping? Was he shopping?

A. Most of the husbands sit around and wait for their wives [577] to get through with the shopping.

Q. Did you see another man that is not in the courtroom that was with Mrs. Kremen on occasion? A. I didn't notice.

Q. You mentioned a while ago another gentleman?

A. There was another gentleman that I could not recognize.

Q. Slender, dark hair? A. Yes, and tall.

Q. And tall?

A. Not really tall, but his slenderness might have made him look taller than he was.

Q. He wasn't heavy-set, with cheeky jowls and blond or reddish hair, was he? A. No.

Q. No? All right. Did you see this other gentleman with Mrs. Kremen on one or more occasions?

A. Just waiting there at the store, possibly at the same time, and sometimes you associate them with each other and say——

Q. The way a husband and wife would?

A. Well, I couldn't say definitely.

Q. Were you ever introduced to this man not

(Testimony of Ruth Lackey.)

in this courtroom as the husband of Mrs. Kremen?

A. Heavens, no. I don't know the names of any of those people, unless we had personal contact with them or cashed [578] their checks or have a business way someway of identifying them.

Q. Did you yourself ever notice Mrs. Kremen together with this other gentleman that is not in the courtroom—shopping together, say?

A. I merely said I noticed he was in the store when she was there.

Q. I see. A. And that is all.

Q. All right. That was on different occasions, was it, than the occasions when you saw Mr. Steinberg there?

A. I wouldn't be—it was on different occasions; I think I can remember about two, or it must have been twice or I wouldn't have had any association with them.

Q. All right. A. I don't know.

Q. Before you came to court, Mrs. Lackey, did you ever have any occasion when representatives of the FBI showed you photographs of people and asked if you had ever seen them before?

A. Just once that they came to the house and asked me if I had seen these people, because we were business people there in Twain Harte.

Q. I understand. Once they came and showed you a lot of photographs?

A. Yes, a lot of photographs. [579]

Q. And they asked you, didn't they, to pick out any photograph or photographs it seemed to

(Testimony of Ruth Lackey.)

you you could recognize as somebody that had been in the store?

A. They asked me if I could recognize any of these people, and I told them the ones I recognized, that is all.

Q. As you look around now, did they show you photographs of all the people who are at that table with the exception of Mr. Leonard, who is sitting right there? (indicating)

A. Not, not a photograph of him.

Q. I say with the exception of him, did they show you photographs of all the other people at that table, ma'am?

A. Well, we saw them in the papers, also.

Q. But I am asking you if the FBI showed you the pictures.

A. They showed us pictures of them, but among many other pictures.

Q. Madam, whether it was among a thousand, ten thousand or only twenty, I am asking you, did they show you pictures of each of the defendants at that table, the defendants being the five——

A. (interposing) I believe——

Q. Excuse me, Ma'am——

A. I believe their pictures were among them. But if I didn't recognize them, it would be hard to remember them unless I had seen them.

Q. All I want to do is get the facts; did you pick out any [580] of the photographs for the FBI at that time? A. Yes.

(Testimony of Ruth Lackey.)

Q. How many different people did you pick out photographs of? A. Two.

Q. Which two were they?

A. Which two were they? They were the lady with the dark hair and the gray dress, and this other gentleman. I don't think I picked out his photograph at the time, but I know I have seen him. And that other I have been speaking of. And it may be a change in appearance since they were at Twain Harte.

Q. Let me get this straight. The FBI showed you the photographs, you remember, and you picked out a photograph of the young lady who was identified here as Mrs. Kremen?

A. Yes.

Q. And did you, too, pick out a photograph of another man, who, I take it, is the gentleman not in the courtroom?

A. I don't know that gentleman.

Q. Madam, will you please attend my question? You have told us about this gentleman who is not in the court.

Mr. Foster: That is assuming something not in evidence, I think. She didn't testify the man wasn't in the courtroom.

The Witness: No.

Mr. Gladstein: Oh.

The Witness: That is what I was objecting to.

Mr. Gladstein: Q. Well——

A. He could be here in the court and through change of appearance I wouldn't know him. Tak-

(Testimony of Ruth Lackey.)

ing off this mustache has made a great deal of difference, this man (indicating).

Q. I thought you told us you looked around and were picking out the people you remembered having seen up there? Do you mean all you did was look at people at the defense table?

A. No, not necessarily.

Q. Well, did you look anywhere else in the courtroom?

A. Well, was I supposed to look back among the people who are just witnesses at this court trial?

Q. Let me ask you, was it suggested to you——

A. (interposing) It wasn't suggested to me.

Q. Wait, please, Madam. Was it suggested to you before you came into the courtroom that there was a defense table and the defendants would be sitting there?

A. I have two brothers who are attorneys and I have been in court trials before.

Q. Yes, ma'am. But all I am asking you is, did anybody say to you before you took the stand—and there is nothing bad about it if it happened, ma'am——. A. No.

Q. Did anybody say to you there was a table?

A. I was merely told that they would be here.

Q. And you were not told where in the courtroom they would be ? [582]

A. The usual arrangement of a courtroom is similar, and I knew it wasn't this table (indicat-

(Testimony of Ruth Lackey.)

ing). It could possibly be. And the important characters are always this side of the rail.

Q. What is that?

A. The people who are on trial are always this side. But I do recognize her. I would recognize her whether she was——

Q. (interposing) I am not asking you about your recognition of her now. I am asking you whether you had any talk with anybody before you got on the stand as to where the defendants would be located in the courtroom? A. No.

Q. All right, let's get back. I am not asking you, and I guess this is what you want to be careful about——

The Court: Don't say that. I don't think it is proper to comment on what the witness is supposed to be careful about.

Mr. Gladstein: It is introductory.

The Court: You said that is something she was supposed to be careful about.

Mr. Gladstein: I didn't mean anything invidious about it, Your Honor, and I withdraw it.

Mr. Gladstein: Q. Mrs. Lackey, you have told us that Mrs. Kremen was a person that you remembered having seen in your store, and Mr. Steinberg on different occasions also in your store, right?

A. I have seen him around the square and in the store. [583]

Q. I have asked you this: did you pick out for the FBI a photograph of Mr. Steinberg when they first showed it to you?

(Testimony of Ruth Lackey.)

A. No, I didn't. But I say I have seen him, as a person. I would recognize him very clearly.

Q. Is today the first time you have stated in the presence of any representatives of the Government or the FBI that you remember having seen Mr. Steinberg?

A. I didn't know their names, except for reading the papers, and the paper was confusing with the names, too.

Q. Madam, we will dispense with the names for the purpose of the question. I am asking you, I am walking over now to a defendant and placing my hand on him. A. Yes.

Mr. Gladstein: Let the record show it is the defendant Steinberg.

Mr. Gladstein: Q. And I ask you, ma'am, is today, here in this courtroom, this afternoon, the first time you have stated in the presence of any representative of the United States Attorney's office or the Government, that you recognize Mr. Steinberg or any photograph of Mr. Steinberg, the man I point out, as somebody——

A. It is.

Q. ——who had been in your place in Twain Harte? A. It is the first time I recognized him.

Q. But it is true that you have previously, before coming in [584] here today, seen photographs of Mr. Steinberg, photographs handed to you by representatives of the FBI or appearing in the newspaper?

A. I have seen many photographs.

(Testimony of Ruth Lackey.)

Q. Madam, please.

A. I do recognize his, and that is all I have to say.

Q. What I am saying is that it is true that before today you did see, handed to you by the FBI for possible identification or recognition, a photograph of the man that you see in this courtroom as Mr. Steinberg?

A. Why, yes. Anyone who has read the newspaper has seen Mr. Steinberg's picture.

Q. And you have? A. Yes.

Q. Just another question about the other gentleman: that one is not sitting at the defense table, is he?

A. Well, it could possibly be Mr. Steinberg, but I am not sure. As far as names are concerned, I am not sure.

Q. Well, let's not worry about names. Just look at the people there and do you see anybody else there at that table now——

A. (interposing) No, I don't remember seeing others.

Q. Yes. And I show you Government's Exhibits 2 and 3 and I will ask you to be good enough to look at those. Do you want to study them? [585]

A. No.

Q. And state whether or not——

A. (interposing) I haven't seen him, no.

Mr. Gladstein: For the record, those are the photographs of Mr. Thompson, Your Honor. I have no further questions.

(Testimony of Ruth Lackey.)

The Court: That is all.

(Witness excused.)

Mr. Foster: Mrs. Roger Butler.

MRS. ROGER BUTLER

was called as a witness on behalf of the Government, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury?

A. Mrs. Roger Butler.

Direct Examination

Mr. Foster: Q. Mrs. Butler, what is your husband's occupation?

A. He is an electrical contractor.

Q. Directing your attention to the first and second weeks in August, 1953, do you recall—. I withdraw the question.

Directing your attention to August, around the first couple of weeks in August, do you recall seeing any of the [586] people in this courtroom?

A. Yes.

The Court: Are you talking about the defendants?

Mr. Foster: The defendants.

The Court: Why don't you direct the witness' attention to the table and not have them wandering around all over the courtroom?

(Testimony of Mrs. Roger Butler.)

Mr. Foster: Q. You could probably do it easier if you would stand up and look at the table.

A. The young lady at the end of the table with the glasses on, at the side.

Q. Where was that?

A. It was at my home in Twain Harte.

Q. And can you tell us what happened on that occasion?

A. She came to the house there for my husband to do repair on the pump at the cabin they had rented in Twain Harte. They had no water in the house.

Q. Is that what she told you?

A. Well, yes, she said that they needed water, they didn't have any, that the pump wasn't running and she wanted my husband.

Q. And what else did she say?

A. That is about all. She gave me two keys and said to have my husband come out as soon as he came home, which he was out on another job and I had no idea what time he would be [587] home, and she said for him to come out as soon as he did come home to repair the pump.

Q. Did you see her on another occasion?

A. Ten or 15 minutes later she came back to the house, asked for the keys back, she thought she might fix the pump herself.

Q. Did she say anything more about your husband fixing it?

A. Yes. She said she wanted him to come out when he arrived.

(Testimony of Mrs. Roger Butler.)

Q. Was she alone on that occasion?

A. There was another lady in the car.

Q. But you couldn't——

A. (interposing) I couldn't identify her, no. I just seen her at a distance. She was light headed.

Mr. Foster: That is all

Cross Examination

Mr. Gladstein: Q. Mrs. Butler, just a question or two: your husband is an electrical contractor?

A. Yes.

Q. This is at Twain Harte, is it?

A. Yes.

Q. Among other things, his work includes repairing such things as pumps?

A. Anything electrical.

Q. The first you ever knew about this was some time in the first and second weeks of August when you say the lady [588] identified as Mrs. Kremen—— A. Yes.

Q. ——came out to your place?

A. That is right.

Q. And told you she heard your husband was an electrician?

A. Mr. Morrow had sent her out.

Q. She told you there was something wrong with the pump?

A. Yes, it wasn't running.

Q. And she wanted to know if your husband could fix it? A. Yes.

(Testimony of Mrs. Roger Butler.)

Q. And she gave you the keys and said, "Here are the keys to the place"? A. Yes.

Q. And a little while later she came back and said she wanted them back?

A. She thought she might fix it herself.

Q. But for your husband to come out when he got home? A. Yes.

Q. And did he go there afterwards?

A. Yes.

Q. You looked at everybody at the defense table before you picked out Mrs. Kremen as the only person you remember having seen before, is that right? A. Yes, sir.

Mr. Gladstein: That is all. [589]

Mr. Foster: No further questions.

(Witness excused.)

Mr. Foster: Mr. Roger Butler.

ROGER GEORGE BUTLER

was called as a witness on behalf of the Government, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury?

A. Roger George Butler.

Direct Examination

Mr. Foster: Q. Mr. Butler, what is your occupation? A. Electrical contractor, sir.

(Testimony of Roger George Butler.)

Q. During the summer of 1953 were you then so engaged? A. Yes.

Q. Do you recall during the month of August of doing any work at the Germany cabin?

A. Yes.

Q. When was that?

A. Approximately the first week of August.

Q. And who was present on that occasion?

A. Just one young lady present.

Q. Do you recognize that young lady at the defense table? [590]

A. Yes, the young lady on the far side at the end.

Mr. Foster: May the record show the witness identified the defendant Shirley Kremen. That is all.

Cross Examination

Mr. Gladstein: Q. Mr. Butler, do you have any way of checking accurately the date on which you went up there to do some work?

A. No, I don't.

Q. It was just a cash transaction?

A. No, there never was any completion of the transaction. There was a question about who was liable for the damage that was done.

Q. What kind of damage was it?

A. A wire was cut underground.

Q. And she asked you to come up there and take a look at it? A. Yes.

Q. And what time of day did you go up there?

A. It was in the afternoon.

(Testimony of Roger George Butler.)

Q. I take it you had come home and your wife had mentioned this? A. Yes.

Q. So you went up there. Did you find Mrs. Kremen up there at the house? A. Yes.

Q. And did she show you what was wrong?

A. No, she merely told they didn't have any water. The pump wasn't operating.

Q. Did you do anything to repair the pump?

A. Yes, I located and repaired the broken wire.

Q. How long were you there, approximately?

A. Oh, I would say an hour and a half.

Q. An hour and a half? And by the way, where was the wire located that you found in disrepair, in the house or outside the house?

A. Outside.

Q. Outside the house? By the way, where was the pump located? A. Outside.

Q. Also outside? I suppose you had occasion to go into the house to see what was wrong with the faucets and so on?

A. No. I went in the house to find out why there was no power in the pump, checked the panel first.

Q. I see. And you went to whatever portions of the house it was necessary for you to go to?

A. Yes.

Mr. Gladstein: That is all.

Mr. Foster: No further questions.

The Court: That is all.

(Witness excused.) [592]

Mr. Foster: Your Honor please, may we take the recess at this time?

The Court: We will take the midafternoon recess now, members of the jury.

(Short recess.) [592-A]

DOROTHY HENRICHSEN

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and to the jury?

A. Dorothy Henrichsen.

Direct Examination

Mr. Foster: Q. Mrs. Henrichsen, what is your business?

A. Well, we own the sports shop in Twain Harte, and my husband is in the real estate business.

Q. Where is the sports shop?

A. Well, it is right in the center of town, on the corner of Joaquin and Meadow Drive.

Q. What do you sell there?

A. Well, we sell all fishing and hunting equipment and White Stag wearing apparel and Gantner swimming suits and trunks.

Q. Were you in that business in the summer of 1953? A. Yes.

Q. Mrs. Henrichsen, I am going to ask you to look at the defendants' table to my left, and ask

(Testimony of Dorothy Henrichsen.)

you if you recall anyone at that table making purchases from you during that period?

A. May I stand up?

Q. Certainly. Get down off the stand if you wish. [593]

A. Yes, the young lady over there and this gentleman here, although he had a moustache at the time, and another gentleman. There was another gentleman at the time.

Mr. Foster: May the record show the witness pointed out the defendant Kremen and the defendant Steinberg.

Mr. Foster: Q. What was this occasion of which you speak?

A. Well, it was either the very last of June or the first of July they came in to buy a pair of swim trunks, and they were buying it for a friend that was ill at the time, and I tried to discourage them from taking them without the party being able to try them on, because there is no return or refund on swimming clothes.

Q. Who was making the purchase?

A. The lady was making them and talking it over with the two gentlemen.

Q. Can you describe the other gentleman who was there?

A. Well, he was tall, rather obese, had very ickey red hair and moustache, and he wasn't a bit good looking.

Q. Showing you Exhibit No. 3, is this the man?

A. That is the man.

(Testimony of Dorothy Henrichsen.)

Q. Is this the color hair? A. That is it.

Mr. Foster: May the record show that I showed the witness United States Exhibit No. 2, a colored picture of Robert Thompson and United States Exhibit No. 3, the black and white [594] of Robert Thompson.

Mr. Foster: Q. Did you see Miss Kremen on many subsequent occasions?

A. Oh, yes, she came into the shop quite often.

Q. Do you recall what she purchased on those occasions?

A. Well, no, because after our little—she came back to return the trunks after they were sold to her because they wouldn't fit. I wouldn't exchange them or give her her money back, and so she didn't care for me much after that. She went to my husband after that. But he did sell her fishing equipment, hooks and things.

Q. You did notice that, fishing equipment?

A. Yes.

Mr. Foster: That is all.

Cross Examination

Mr. Gladstein: Q. Mrs. Henrichsen, can you tell us as nearly as you can recall the first time that you ever saw Mrs. Kremen?

A. As I said before, it was either the very last of June or the 1st of July.

Q. On that occasion did you see her alone the first time?

A. No, she was with the two gentlemen.

(Testimony of Dorothy Henrichsen.)

Q. She was with two gentlemen?

A. That is right. [595]

Q. On how many occasions did you see her with those two gentlemen?

A. That is the only time I saw her with those two.

Q. With those two. Do you remember whether or not that was just before the 4th of July or was it just after?

A. I can't remember exactly when it was.

Q. Could it have been just about that time?

A. It was either the very last of June or the very first of July.

Q. You know July 4th is the holiday season. Do you have some recollection of that holiday season last year? A. No, I am afraid not.

Q. Anyway on that occasion, you did see Mrs. Kremen and these two other men, is that right?

A. That is right.

Q. One of those men is the man whom you have identified in this picture, Exhibit 2, and the other man, is he in the courtroom?

A. Yes, he is right there at the end of the table. As I said before, he had a moustache when he was in the shop.

Q. You are sure that is the same man?

A. I am positive.

Q. You are positive the other man you saw with Miss Kremen is the same person whose photograph is Exhibit 2? A. Absolutely. [596]

Q. You are positive? A. I am positive.

(Testimony of Dorothy Henrichsen.)

Q. Mrs. Henrichsen, did you sell anything to this man?

A. I sold a pair of swimming trunks to the lady. The men were with her at the time.

Q. Did you sell anything to the men?

A. Never sold anything to the men.

Q. How long did you have occasion to see this man who has been identified here as a Mr. Thompson?

A. Why, quite sometime because it took me some time to find trunks without the gentlemen trying them on, and we discussed that quite lengthly, that they shouldn't take the trunks unless the man came in and tried them on.

Q. You mean this man whose picture is Plaintiff's 2 wanted to buy a pair of trunks without trying them on?

A. No, the lady was buying them for a sick friend.

Q. Was she with those two gentlemen?

A. She was with that gentleman and the gentleman at the table.

Q. When you say that man, let the record show that the witness referred by a nod of the head to a document which I have in my hand, which is Plaintiff's Exhibit 2.

Approximately how long would you say you had this man, whose photograph is Exhibit 2, under your direct observation on that occasion? [597]

A. Well, they stayed around the shop for a few minutes before I was able to wait on them, and I

(Testimony of Dorothy Henrichsen.)

noticed them quite a bit there because I wanted to get to them as soon as I could, and I would say 20 minutes, approximately.

Q. Can you describe the appearance of this man who has been identified here as a Mr. Thompson on the occasion that you saw him?

A. I certainly can.

Q. Would you do that?

A. He was quite tall, and he was very heavy set. He had a receding chin, and he had this queer color red hair and moustache, and he wore a hat.

Q. He wore a hat, you say?

A. He wore a hat, and what I could see of his hair around here was the same color as his moustache, a very odd color red.

Q. Do you remember how he was dressed?

A. No, I can't remember that. I think he was in khakis but I couldn't be positive of it.

Q. What kind of hat did he wear?

A. I don't know. It had a brim and that is all I know.

Q. Was it a hat or a cap?

A. It was a hat.

Q. Was there anybody else besides you in the store at that time? [598]

A. No. My husband I believe was out at lunch at the time.

Q. Altogether how long were they in your shop?

A. Approximately 20 minutes.

Q. You never saw that man whose picture is Exhibit 2 either before or since that time?

(Testimony of Dorothy Henrichsen.)

A. I saw him on the streets afterwards.

Q. Oh, you did see him on the streets? When you afterwards, you mean within the next few days?

A. Well, I can't tell you exactly when I saw him, but I just remember passing him by or seeing him walk past the shop after they were in the shop.

Q. I mean within a matter of a few days thereafter?

A. I couldn't say whether it was a matter of a few days or whether it was two weeks later.

Q. Would it be within two weeks thereafter?

A. No, I wouldn't even say that. It was just sometime during the summer I seen them on the street.

Q. You have told us now that either late in June or early July you saw this man for the first time, is that right? A. That is right.

Q. Now you say later on you had occasion to see him at least once and very possibly more?

A. That is right.

Q. Several times?

A. That is right. [599]

Q. And that would be in the course of some days or weeks thereafter? A. That is right.

Q. It would still be in the month of July, wouldn't it?

A. I wouldn't say that either. It might have been in July, it might have been in August. I don't really know. All I know is I saw him on the streets.

Q. Can you tell me approximately how many

(Testimony of Dorothy Henrichsen.)

times you saw this man that is Plaintiff's Exhibit 2 on the streets in Twain Harte?

A. No, I wouldn't be able to say that.

Q. Could you say it was a half dozen times or so?

A. No, I wouldn't say it was that many.

Q. Three or four?

A. Somewhere in the neighborhood.

Q. Can you tell us approximately when is the latest time when you saw this man, Mr. Thompson?

A. No, I didn't pay any attention to the dates at all.

Q. Madam, living up there at Twain Harte, of course, you became aware on the 27th of August, or within a day or so thereafter, about the F.B.I coming in and arresting people at the Germany house, didn't you? A. Yes.

Q. Fixing that occasion in your mind, can you tell me approximately how long before that time it was that you last saw Mr. Thompson, Plaintiff's Exhibit 2? [600]

A. No, I'm afraid I can't.

Q. Wasn't it a matter of a day, a matter of a month or two? A. I just couldn't say.

Q. Did you ever see this photograph or series of photographs or similar photographs to this before you walked into this courtroom?

A. I saw similar ones.

Q. Where did you see similar ones?

A. When the F.B.I. came up to Twain Harte.

Q. When was that?

(Testimony of Dorothy Henrichsen.)

A. That I couldn't tell you. It was sometime after August 27th.

Q. You saw some photographs in newspapers, too, did you? A. Yes.

Q. Did you see photographs of this man in newspapers? A. I believe I did.

Q. And you read about it, did you?

A. Partly.

Q. And you read that this man was said to be Robert Thompson, did you?

A. Well, names I am not so good at.

Q. You do not remember that?

A. I don't remember names.

Q. Did you the very first time that this man's photograph was shown to you tell the F.B.I. that you had seen this man [601] either late in June or early in July? A. I did.

Q. Did they say that this man was not in California in June? A. No, they did not.

Q. Did they say to you that this man was not in California in July? A. They did not.

Q. Did they say to you in late June or early July this man was supposed to have been in St. Louis, Missouri? A. No.

Q. Did they ask you if you were very certain that this is the man you saw? A. They did.

Q. And you told them you were?

A. I did.

Q. On the occasions when you saw this man walking through the streets of Twain Harte did

(Testimony of Dorothy Henrichsen.)

you notice anything at all about him, about how he was dressed or anything else?

A. No, other than he was dressed like all the other summer people that just come up there to lounge around and be comfortable.

Q. Did you notice on any of those other occasions that he was with anybody else or did he seem to be alone?

A. I have seen him with another gentleman on the street.

Q. With another gentleman? [602]

A. Yes.

Q. Some gentleman you have not mentioned here today? A. That is right.

Q. Is he in the courtroom?

A. Yes, he is.

Q. Who is that gentleman?

A. That is the gentleman sitting right over there with the glasses.

Q. This one in the brown suit?

A. Yes, sir.

Q. So you saw this man, Mr. Thompson, and Mr. Coleman also on the street, did you?

A. Yes, sir.

Q. Tell us when you saw them together?

A. I don't know the exact time. It was sometime during the summer months.

Q. Let me ask you this: The first time you saw Mr. Thompson, Plaintiff's Exhibit 2, you have told us that you saw him and Mr. Steinberg in the blue suit and Mrs. Kremen? A. Yes.

(Testimony of Dorothy Henrichsen.)

Q. Then sometime after that you saw Mr. Thompson on the streets? A. Yes.

Q. On some occasions he was alone and on one occasion you saw him with Mr. Coleman? [603]

A. That is right.

Q. I am trying to ask you if you have any recollection about it. Can you tell me whether it was a matter of days, weeks or whatever it was from the time you first saw Mr. Thompson until the time you saw Mr. Thompson with Mr. Coleman?

A. No, I couldn't.

Q. Did you tell the F.B.I. that you had seen Mr. Coleman up there? A. Yes, I did.

Q. Did you tell Mr. Foster that you had seen Mr. Coleman up there? This is Mr. Foster.

A. I have talked to a couple of F.B.I. I guess I told Mr. Foster. No, I believe it was just the F.B.I. that I talked to.

Q. Did you see when you were telling them, when they were interviewing you, whether they were making notes of what you said?

A. The F.B.I.?

Q. Yes. A. Yes, they did.

Q. Did they ever present you with anything in writing for you to examine and see if it was right and sign it? A. They did.

Q. So you actually gave a written statement?

A. That is right.

Q. In your written statement, madam, did you in the written [604] statements say you had seen Mr. Sam Coleman up there at Twain Harte?

(Testimony of Dorothy Henrichsen.)

A. Yes, I did.

Q. Did Mr. Foster say to you before you took the stand that he was not going to ask you about Mr. Coleman?

A. Mr. Foster did not talk to me.

Q. Did anybody talk to you before you took the witness stand? A. Nobody talked to me.

Q. I want to show you Plaintiff's Exhibit 3. Do you recognize that? A. Yes, I do.

Q. What do you recognize it to be?

A. That is the tall, heavy-set, red headed man.

Q. The same one as Plaintiff's Exhibit 2?

A. That is right.

Q. Madam, do you recall ever seeing this man, Mr. Thompson in or near any kind of an automobile?

A. No, I have never seen any of them near an automobile.

Q. Do you recall seeing a Hudson automobile, a new automobile around Twain Harte last summer?

A. I don't have the faintest idea of makes of cars. I hardly know our own make.

Q. Did you sell some things to Mrs. Kremen?

A. I sold her a pair of swimming trunks.

Q. Was there any other sale besides that one?

A. Not by myself. My husband made sales.

Q. Did you keep a record of when it was that you sold her these swimming trunks?

A. We don't keep records of cash sales.

Q. Is there anyway you can check up to find

(Testimony of Dorothy Henrichsen.)

out for sure when it was that you sold her those trunks?

A. No, the only thing I can check up was the time we ordered Ping-pong balls for her. That is on an invoice. We have a record of that.

Q. When was that?

A. I couldn't tell you. It was very shortly before they were picked up, because I know they hadn't arrived until a few days after they were taken into custody.

Q. What had not arrived?

A. The Ping-pong balls.

Q. When did they arrive?

A. That I couldn't tell you.

Q. Whenever it was, did the Ping-pong balls arrive before or after the arrests were made?

A. They arrived after the arrests were made.

Q. Do you remember how long after the arrests were made did the Ping-pong balls come?

A. I think it was just within a few days.

Q. Do you remember when it was that the order was put in for the Ping-pong balls?

A. It was within a few days before the arrest, because it only [606] takes about a week to get the order.

Q. Was that the only order for Ping-pong balls that was given to you by any of the defendants?

A. Yes, by the defendants.

Q. Who gave you the order for the Ping-pong balls?

(Testimony of Dorothy Henrichsen.)

A. They didn't give it to me. They gave it to my husband.

Q. Were you present when that happened?

A. Yes.

Q. What person gave you the order?

A. The lady.

Q. Mrs. Kremen? A. That is right.

Q. Was she alone then? A. Yes.

Q. Did you sell her anything else?

A. I only sold her the trunks.

Q. Do you know whether your shop sold Mr. Thompson anything at all?

A. Never while I was there.

Q. Do you know whether your shop sold Mr. Steinberg anything? A. Not to my knowledge.

Q. Do you know whether your shop sold anything to Mr. Coleman? A. Not to my knowledge.

Q. Madam, when you told the F.B.I. that you had seen this man whose photograph is shown in Plaintiff's Exhibit 2 and 3, did [607] any of them state to you that you were or might be mistaken in your identity? A. No.

Mr. Foster: I will object to that as asked and answered.

The Court: Sustained.

Mr. Gladstein: I have no further questions.

The Court: Anything else?

Mr. Foster: Just a few questions.

(Testimony of Dorothy Henrichsen.)

Redirect Examination

Mr. Foster: Q. Mrs. Henrichsen, Twain Harte is a resort, is that not true?

A. That is right.

Q. Is there such a thing as a definite season in Twain Harte? A. Yes, there is.

Q. About when does that season start?

A. It usually starts when the schools are out down here in the Bay Area and in the Valley, which is around the middle of June, and it ends,—well, Labor just about winds it up.

Q. Can you fix the time that you saw Robert Thompson with reference to the beginning of the season at Twain Harte?

A. Yes, I can, because we had—our season started out with very cold weather, and almost the whole of June was quite cold, and they were very close to our first customers on swimming apparel.

Mr. Foster: That is all.

Recross Examination

Mr. Gladstein: Q. In other words, that would be the first part of July?

A. It would be either the last part of June or the first part of July. Almost all June was cold and it turned warm towards the very end of June, and I can't tell whether they came in at the end of June or the first of July.

Q. Very close to the 4th?

A. I don't know if it was close to the 4th, but

(Testimony of Dorothy Henrichsen.)

it was somewhere in that period, right at the very end of June or the first of July.

The Court: That is argumentative. Anything else of the witness?

Mr. Gladstein: No.

(Witness excused.)

GLENN F. ELLIS

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and jury?

A. My name is Glenn F. Ellis. [609]

Direct Examination

Mr. Schnacke: Q. Mr. Ellis, where do you reside?

A. In Danville, 2222 Diablo Road.

Q. Danville, California?

A. Danville, California.

Q. By whom are you employed?

A. Laird's Stationers in Oakland.

Q. What is their address in Oakland?

A. 320 - 13th Street.

Q. 320 - 13th Street in Oakland. What is the general nature of the business of Laird's Stationers?

A. Stationers, but they have a specialty department which I am in, duplicating department.

Mr. Gladstein: Your Honor, I am not hearing a thing the witness says.

(Testimony of Glenn F. Ellis.)

The Court: Yes. We had to open the windows to get a little air in. Will you speak a little louder?

Mr. Schnacke: I think that the witness talks closer to the microphone——

The Witness: A Stationery business.

Mr. Schnacke: Q. I think your last answer was that you are in charge of the duplicating equipment department? A. That is right.

Q. At Laird's Stationery & Office Supply Company? A. That is right. [610]

Q. I will call your attention to the latter part of June, 1953, and ask around about that period of time whether you had a business transaction with any of the persons whom you see sitting at the defendants' table, and if you care to get up and go closer to the table and examine them, you may feel free to do that.

A. It has been some time, but the gentleman sitting to the right of the lady there in the rear, in the black hat.

Q. You are referring to this gentleman? Identifying the defendant Ross. What was the nature of the business transaction you had with him?

Mr. Gladstein: I am going to object to that until a proper foundation has been laid as to time, place and persons present, if Your Honor please.

The Court: Lay a foundation.

Mr. Schnacke: Q. Calling your attention to the latter part of June, 1953, was that the time approximately that you had a business transaction with this gentleman? A. That is right.

(Testimony of Glenn F. Ellis.)

Q. Where was that transaction?

A. At 320 - 13th Street.

Q. At the Laird's shop? A. Yes.

Q. Who was present in connection with the transaction on the first time that you met with him? [611] A. Just myself originally.

Q. Can you place the date of that first meeting with Mr. Ross?

A. On the 28th, I believe, according to our records.

Q. The 28th of June of last year?

A. Yes.

Q. What was the nature of the transaction?

A. He asked for a small duplicating machine, which we did not have in stock at that time, but I told him I would order it for him and—which I did, and he picked it up the following day.

Q. Did you see him on the following day?

A. Yes.

Q. What occurred on the following day?

A. He picked up this small duplicating machine in the carton.

Q. In the carton? A. In the carton. [612]

Q. I take it you sold him a duplicating machine?

A. That is right.

Q. What type of machine was that?

A. A Print-O-Matic.

Q. A Print-O-Matic? A. A-4.

Q. I show you a photograph marked Defendant's Exhibit A-3 in which there is a carton with

(Testimony of Glenn F. Ellis.)

the words "Print-O-Matic" on it, and ask you if that carton appears familiar to you? A. Yes.

Q. Is that a carton similar to the carton that enclosed the machine that you sold?

A. That is right.

Q. And I will show you Defendants' Exhibit A-13, a photograph appearing to be some type of duplicating equipment, and ask you if that equipment is similar to the equipment that you sold?

A. It is.

Q. Do you have any records reflecting those transactions? A. Yes, sir.

Q. Do you have them with you?

A. I have.

Q. This record is dated June 29, 1953. That represents a sale that was made by you on that occasion? A. That is right. [613]

Q. And what name did the man that you have identified give you in connection with this transaction?

Mr. Gladstein: One moment, sir. Your Honor, I am going to object to this as hearsay so far as all defendants other than Mr. Ross.

The Court: Well, for the time being it may be admitted as against the defendant Ross.

Mr. Schnacke: All right.

Mr. Schnacke: Q. What name did the man that you have identified as Carl Ross give you in connection with this transaction? A. Newman.

Q. Newman? Is that the name you put on the documents? A. Yes.

(Testimony of Glenn F. Ellis.)

Q. Could I again have the sales slip and invoices? You have handed me two slips, both of them appearing to be invoices. Would you describe what each of them represent?

A. Those are charges which we make up for all sales. This one represents the machine sale, which was made out on the 29th when he picked the machine up.

Mr. Schnacke: I ask that the invoice identified by the witness as representing the machine sale be received in evidence as Government's exhibit next in order as to the defendant Ross only at this time.

The Court: It may be admitted. [614]

(Thereupon the invoice referred to above was received in evidence and marked Government's Exhibit No. 114, against Defendant Ross only.)

Mr. Schnacke: Q. And this document is——

A. This represents the supplies purchased.

Q. Did he buy supplies at the same time?

A. Yes.

Mr. Schnacke: I will ask that the invoice representing the supplies purchased just testified to by the witness be received in evidence as against the defendant Ross, to bear Government's Exhibit number next in order.

Mr. Gladstein: Your Honor, to this and the preceding exhibit I reserved making my objection that this is a substitute form of evidence as to which, as to the machine itself, we have previously made a motion to suppress, and for the same reasons advanced on that occasion I will make the objection.

(Testimony of Glenn F. Ellis.)

The Court: Overruled. It may be admitted.

(Thereupon invoice referred to above was received in evidence and marked Government's Exhibit No. 115 as against the Defendant Ross only.)

Mr. Schnacke: May I describe the exhibits for the ladies and gentlemen of the jury, Your Honor?

Government's Exhibit 114 is an invoice of Laird's Stationery Store, reading, "Sold to R. E. Newman, 201 Oak Street, Redding;" [615] it is dated June 29, 1953, and describes an A-4 Print-O-Matic. Total amount of invoice is $601.73, and it reads "Paid by cash $629.53."

The next document, Exhibit 115, "R. E. Newman, June 29, 1953, 201 Oak Street, Redding," and it covers three stencils, two polychrome black ink, four reams of white mimeograph bond, one bottle of polychrome correction fluid, and one stylus. Total amount of that is $25.88, and that is marked "Paid".

Mr. Schnacke: Q. When and where did you last see Mr. Newman, as you knew him on that occasion?

A. On the 29th when he put the carton in his car.

Q. You assisted him to load it?

A. To the curb.

Q. Put it into the car? A. Yes.

Q. Do you know what kind of car that was?

A. I am not certain. It was a smaller make car. Could have been a Chevrolet or something of that nature.

(Testimony of Glenn F. Ellis.)

Q. Was it a sedan or coupe or convertible, do you recall?

A. I don't recall clearly. It seems to me that it could have been a two-door as we moved the seat forward to get the machine in the car.

Mr. Schnacke: No further questions; thank you.

Cross Examination

Mr. Gladstein: Q. Just a question, sir: I gather from your testimony that this duplicating machine is a portable, is that right?

A. That is right.

Q. And what are its approximate dimensions? Do you mind, for instance, stepping over and taking a look at this recording device that is here? Is it about that same size?

A. It would be a little longer and a little higher than that.

Q. It's width is what?

A. It's width is a little beyond that.

Q. Thank you very much. I don't know what the dimensions are of this. However, it is going to be in court——

Mr. Gladstein: Well, the Clerk has handed me this ruler. This is 13 or 14 inches in length. It is between 8 and 9 inches wide, and it is 9 inches high.

Mr. Gladstein: Q. From that, what would you say the dimensions of this machine was that you sold?

A. Well, it is longer this way (indicating).

Q. How much longer?

(Testimony of Glenn F. Ellis.)

A. All right, what were the dimensions this way?

The Clerk: Thirteen inches.

A. Thirteen?

Mr. Gladstein: Q. Yes.

A. It would be a good few inches longer if you count the [617] receiving tray and feed tray on it. The impression roller would measure seven and one-quarter inches, and the machine itself would be a good two or three inches wider than that.

Q. That makes it nine or ten inches wide?

A. Yes. Maybe a little bit wider.

Q. And the height?

A. The height would be about that, 12 inches easily.

Q. About 12 inches or more?

A. Somewhere around there.

Mr. Gladstein: That is all.

Redirect Examination

Mr. Schnacke: Q. It was an easily portable machine?

A. It is a portable machine, yes.

Mr. Schnacke: Thank you, very much.

The Court: That is all.

(Witness excused.)

Mr. Schnacke: Mr. Prelsnik.

CHARLES J. PRELSNIK

was called as a witness on behalf of the Government, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury? [618]

A. My name is Charles J. Prelsnik.

Q. Will you spell your last name?

A. P-r-e-l-s-n-i-k.

Direct Examination

Mr. Schnacke: Q. Mr. Prelsnik, what is your occupation?

A. I am a Special Agent of the FBI.

Q. And where are you stationed?

A. At San Jose, California.

Q. San Jose is a resident agency under the San Francisco office, is it?

A. Yes, sir, it is.

Q. In August of 1952 were you stationed at San Jose? A. Yes, sir.

Q. Directing your attention to the 27th of August of last year, did you on that day see any of the persons who are now seated at the defense table? A. Yes, sir.

Q. And which of those persons did you see?

A. The lady at the—writing, with the checkered —looks like a checkered dress and brown hat.

Mr. Schnacke: Identifying the defendant Patricia Blau.

(Testimony of Charles J. Prelsnik.)

Mr. Schnacke: Q. And where did you see her, sir, for the first time on that day?

A. I saw her about in the vicinity of 69 North 10th Street, [619] San Jose, California.

Q. About what time of day was that?

A. I would say it was approximately 5:25, 5:30 p.m.

Q. Were you under instructions to keep the defendant Blau under surveillance at that time?

A. Yes, sir.

Q. And did you maintain that surveillance?

A. Yes, sir, I did.

Q. Can you tell us from the time you first saw her what you observed her do?

Mr. Gladstein: I am going to object as incompetent, irrelevant and immaterial.

Mr. Schnacke: How can it be incompetent?

The Court: Well, I can't tell yet until we hear what he says. I don't know how I can rule on that. I will overrule the objection.

The Witness: Would you repeat the question?

Mr. Schnacke: Would you read the question, Mr. Reporter?

(Question read by the Reporter.)

A. I saw her come out of her residence at, as I say, I believe 69 North 10th Street. I was about half a block away at the corner of 10th and the street just north.

I observed her come out of this residence. She was dressed, as I recall, in a blouse and a floral print skirt. She was carrying a small overnight bag

(Testimony of Charles J. Prelsnik.)

and a coat over her [620] arm. She proceeded north on 10th Street and walked past my position where I had been observing her.

Do you want me to continue?

Mr. Schnacke: Q. Yes. Where did she go from there?

A. Well, she passed by my automobile. I recognized her as being Patricia Blau or Janet Conroy. I had a photograph of Patricia Blau and was able to identify her from that.

And that information was substantiated by Agent Shedd who was also working on the surveillance.

Mr. Gladstein: Who?

Mr. Schnacke: Shedd—S-h-e-d-d.

A. (continuing) She was walking slowly in a casual manner, and walked, as I say, north on 10th Street, then turned right into 11th Street, and then I saw her off and on intermittently, I would say, until she came to a position at 13th and Julian Streets, where I saw her sit down on a bench. This was approximately, oh, 6:00 o'clock or a quarter to 6, I would say.

I then took a position away from that point on 12th Street where—in my car, where I could observe her or be told of anything going on in the vicinity.

Q. And when did you next see her?

A. I next saw her going by me at approximately 6:00 o'clock in a Chevrolet car, green coupe, with a male companion driving the car. [621]

Q. What direction were they going?

(Testimony of Charles J. Prelsnik.)

A. They were going west.

Q. On what street? A. Julian.

Q. Did you follow them?

A. Yes, sir, I did.

Q. And what did you observe?

A. Well, they took a circuituous—a circuituous——

Mr. Gladstein: I object to that as incompetent, irrelevant and immaterial; not probative of any issues in this case. [622]

The Court: Well, I will have to see what he says. Is this the same subject matter that was covered by the witness Shedd?

Mr. Schnacke: Not in the presence of the jury.

The Court: Oh.

Mr. Schnacke: It is the same subject matter.

Mr. Schnacke: Q. May I suggest, Mr. Prelsnik, you leave out the adjectives and just tell us what you observed as you were observing.

A. I observed her riding in this automobile with a man driving, and the car went up one street—the exact streets I don't recall—and turned right and proceeded around, down two more blocks and turned right again, then probably left, then right, and all in the same vicinity.

There was no direction, apparently, other than going up one street and down the other, until finally they did come back to the point where they began and continued past me, and then drove into the Oakland highway.

Mr. Gladstein: I am going to object to that and

(Testimony of Charles J. Prelsnik.)

ask that that be stricken on the ground that it is incompetent, irrelevant and immaterial. It is prejudicial. No proper foundation has been laid to show my client was driving that automobile. No foundation has been laid to make this probative of anything concerning her conduct.

The agent, Your Honor will notice, has carefully not been [623] asked who the companion was and whether that companion was driving the automobile, and it isn't the responsibility of my client as to the particular course, if any, some unidentified person so far here took.

The Court: Well, I will overrule the objection, but you might bring that out so that it would be clear.

Mr. Schnacke: I thought the witness said already the man the agent identified was driving the car.

The Court: I thought so.

Mr. Schnacke: Q. I might ask you this question, to clarify it: Did you see any attempt by Mrs. Blau to get out of the car while it was in motion?

A. No.

Q. Did she appear to be under any restraint?

A. No, sir.

Q. Up to the time that they passed for the second time this point at which you had first observed them, how much time was involved?

A. Oh, I would say approximately 15, 20 minutes.

(Testimony of Charles J. Prelsnik.)

Q. And then what did you observe the automobile in which Mrs. Blau was riding do?

A. Well, it went up 13th Street, which is the Oakland highway, then across the Bay Street highway onto the Oakland highway proceeded at, oh, a normal rate of speed, I would say 40 to 45 miles an hour as I clocked it on my speedometer at the time. [624]

Q. You have said "normal." I don't want you to use such terms. Simply describe the speed and describe what you saw without using any such qualifying terms or Mr. Gladstein will object. Will you proceed?

A. I would say 40 to 50 miles an hour. They weren't exceeding the speed limit of 55 miles an hour.

Q. And what did you observe?

A. They continued along that Oakland highway to a point between Mission San Jose, where they left that highway for the Livermore highway, made a right turn onto the Livermore highway.

Q. Going in the direction of Livermore?

A. Going in the direction of Livermore, yes, sir. And continued at the same rate of speed. They went on into Livermore and were held up by a stop signal. They observed the stop signal in Livermore, and continued through Livermore to Highway 50, I believe it is, en route to Tracy or Stockton.

Before coming to Tracy, they turned off on what is known to me as the Banta Cut-off. They turned left at that point, crossed over the railroad tracks

(Testimony of Charles J. Prelsnik.)

and drove a short distance and came to a stop. They stopped momentarily and then resumed their travel.

Then they turned off the Banta Cut-off onto a small road, small country road to the left. It is very flat, open territory there.

And they went down that road there for some distance, [625] stopped, turned around, came back a short distance, took another road, I would say in an easterly direction; followed that for some distance, then turned left on another road, stopped, turned around and came back.

Then they proceeded in an easterly direction again and came into the Banta Cut-off again, and which took them into Highway 50. They followed Highway 50 to a point just outside of Stockton, where they left the road again, turned to the right and went on that road a short distance, and it looked like a dead-end, and they turned around and came out and parked.

I saw the driver of the car get out and walk into a telephone booth. He was in the telephone booth, I would say, two or three minutes. I remember looking at my watch at the time and it was approximately 7:25.

He got back in the car and on Highway 50 proceeded to Stockton, stopped at a restaurant on the outskirts of Stockton, sort of a driveway restaurant. You park your car immediately adjacent to the restaurant, and the tables are along the windows.

They went in and sat down at the table. That was

(Testimony of Charles J. Prelsnik.)

about a quarter to 8:00. They were there, I would say, about 20 or 25 minutes, and had been eating.

They left the restaurant and drove in towards Stockton. They didn't go down into downtown Stockton but made a right [626] turn out on that, as I recall it, sort of a semi-residential shopping area, and went up one street, turned left on another, and then went up in the direction they had been previously coming, and then back again. This was after dark. It was now dark and they were traveling at a much faster speed going through the streets.

Mr. Gladstein: I am sorry to interrupt but I want to move that that be stricken—all this testimony, as not binding upon the defendant I represent, against whom the testimony is evidently being elicited. And moreover, the comment of the witness or statement that apparently presumes that the driver of the automobile was a man and not my client.

The Court: You have made a motion, have you?

Mr. Gladstein: Yes.

The Court: The witness hasn't finished his answer, but I will deny the motion.

The Witness: A. (Continuing) This driving up one street and down another street continued for, oh, five or ten minutes, and then they drove out of Stockton to a road, as I recall, that comes along the San Joaquin County Fair Ground; made a right turn and followed to a point where it intersects which the Mariposa highway.

(Testimony of Charles J. Prelsnik.)

They took that road, turned right on that and proceeded along that. There is a main highway intersects that road. I don't know the name of it or the number of it. I don't recall [627] it.

There are stop lights there. They stopped at the stop lights and then continued, and after leaving those stop lights they picked up an accelerated rate of speed, much faster than they had driven heretofore.

Mr. Gladstein: I move that all that be stricken. It isn't a question of "they." Of course two people don't drive an automobile. It is the man that sits behind the wheel that establishes the speed, and there is no foundation for this kind of testimony against Mrs. Blau.

The Court: What is the precise point of your objection?

Mr. Gladstein: The witness said, "they."

The Court: I understood what you said, but I don't know what you want me to do.

Mr. Gladstein: I make a motion to strike.

The Court: Denied.

Mr. Schnacke: Q. Prior to stopping at the stop light how fast had the car been going?

A. I would say 40 to 50 miles an hour.

Q. After leaving the stop light what was the speed?

A. They gradually increased to 60 to 65 miles an hour.

Q. From the time you saw the car leave the stop light, what did you observe?

(Testimony of Charles J. Prelsnik.)

A. The car, as I say, increased its speed to 60 or 65 miles an hour and it became increasingly difficult to hold the [628] surveillance. The road is narrow——

Mr. Gladstein: I move that be stricken.

The Court: Yes. That is a conclusion of the witness and may go out.

Mr. Gladstein: Your Honor, may I ask—I observe it is five minutes after 4:00. I wanted to ask the Court whether the Court was going to close at the usual hour of 4:00 o'clock. We have passed that now. For this reason, I have a painful jaw condition and have made a dental appointment for an extraction at 4:30.

The Court: As soon as we finish this testimony we will adjourn.

Mr. Gladstein: The witness is going to give testimony that can't possibly be finished this afternoon.

The Court: I am not going to stop in the middle of an answer.

Mr. Gladstein: Oh, I didn't understand Your Honor's statement. I thought you meant the testimony.

Mr. Schnacke: Another five minutes Mr. Gladstein.

The Witness: A. (Continuing) The car was going between 60 and 65 miles an hour and I was—we were picking up our speed, too.

Mr. Schnacke: Q. Just tell us what the automobile in which the defendant Blau was riding did?

A. Well, it was going, as I say, 60 to 65 miles

(Testimony of Charles J. Prelsnik.)

an hour, and [629] then I noticed that on both sides of the car the windows apparently were rolled down and both from the driver's side and from the rider's side of the automobile I saw hands extended and what appeared to be small bits of paper blown out over the back of the car.

I was in touch with my office by radio, and I advised them of these circumstances and I was instructed to make an arrest.

I advised the lead car in which Agent Shedd was in to put on the red light and siren and stop them. He turned on his red light and siren and I would judge for the next four or five miles chased them, and the speed was increased by the car in which the defendant was riding and our cars. Agent Shedd was aware of this and——

Mr. Gladstein: Oh, I object to all this, giving his conclusion and the conclusion of another officer.

The Court: You finally overhauled them?

The Witness: A. I asked Mr. Shedd to go ahead and slow them down and overhaul them, which he did.

Mr. Schnacke: I think that is a convenient place to stop, Your Honor.

The Court: There will be more testimony?

Mr. Schnacke: There will be more testimony.

The Court: Mr. Gladstein wants to get his medical attention. All right, you may step down. We will resume the trial tomorrow morning at 10:00 o'clock, ladies and gentlemen.

(Whereupon this cause was adjourned to the hour of 10:00 o'clock a.m., Tuesday, April 20, 1954.) [630]

The Clerk: United States vs. Kremen, et al, further trial. Charles Prelsnik to the witness stand.

CHARLES J. PRELSNIK

called as a witness on behalf of the Government, resumed the witness stand, and having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Mr. Schnacke: Q. Mr. Prelsnik, when we ended last evening, as I recall, you had observed the scraps of paper flying out of the automobile; you had reported to your office; you had received instructions to proceed; you had instructed the lead car to turn on its lights and siren. That car had proceeded for some distance down the road. You gave instructions for that car to pull in front of the car in which Mrs. Blau was riding, and it had succeeded in bringing the Blau car to a stop.

Is that where we were last evening?

A. Yes.

Q. All right; will you tell us what occurred after that time as between yourself and the defendant Patricia Blau?

A. Well, I stopped my car behind that of the defendant and [632] the driver's car, and got out of my car, and I approached the other automobile on the driver's side.

I asked him to get out of the car, asked him

(Testimony of Charles J. Prelsnik.)

for his identification. He identified himself as being Harvey Wilson Richards.

Agent Shedd was with me at that point. I left Agent Shedd with Richards and went around to the other side of the car, and the defendant was then getting out of the car with Agents Held and Berryman standing there. I told her she was being placed under arrest for aiding and abetting Federal fugitives and we were going to take her back to Stockton.

I had Agents Held and Berryman escort her back to Stockton in their car. Agent Shedd drove the instant automobile which they had been riding in, and I proceeded back to Stockton with Richards in my car.

Q. And did you see Mrs. Blau again on that evening? A. Yes, sir.

Q. And where did you see her?

A. I saw her in the United States Post Office Building in Stockton, California.

Q. And what occurred there?

A. I—we had her in the room with Agents Held and Berryman. I approached her and identified myself again, as I had in the original instance, as being a special agent of the Federal Bureau of Investigation. I showed her my credentials. I advised her I wanted to ask her some questions. [633]

I advised her she didn't have to make any statement to me, that any statement she did give me could be used against her in a court of law, and also of her right to have an attorney.

(Testimony of Charles J. Prelsnik.)

I asked her if her—I said, "Are you ready to answer my questions, Mrs. Blau?" She handed me two cards, stating, "This is my identification". One was a Social Security card with the name Janet Conroy, and the other was a library card with the name Janet Conroy.

I asked her one or two other questions and she refused to answer my questions. I asked her if she would answer my questions and she said, "No."

I said, "In that case, Mrs. Blau, I am going to take you to the San Joaquin County Jail where you will be kept tonight, and tomorrow morning you will be brought before the United States Commissioner at Stockton for arraignment and bail."

I then contacted the San Joaquin County Jail and told them we were bringing a woman prisoner and asked them to have a matron available.

Q. And did you go with Mrs. Blau to the San Joaquin County prison or jail?

A. No, sir. I had Agents Held and Berryman take her to jail.

Q. Did you see Mrs. Blau again on that evening? A. Yes.

Q. When and where was that? [634]

A. I saw her at the booking desk at the San Joaquin County Jail.

Q. And who was present there?

A. The matron, the desk sergeant, Agents Held and Berryman, Murphy, and myself.

Q. What occurred there?

(Testimony of Charles J. Prelsnik.)

A. The defendant was booked on route to the United States Marshal.

Q. Was she asked her name?

A. She was asked her name.

Q. And what reply did she give?

A. She said her name was Janet Conroy.

Q. What occurred after that?

A. The matron conducted—started to conduct a search of the defendant, and she handed me a handful of bits of paper which she had taken from the defendant, and I told the matron it would be necessary for the matron to take her to other quarters as I wanted a complete search of all of her clothes.

Q. Did the matron take her away?

A. Yes, sir.

Q. Did you see Mrs. Blau thereafter on that evening? A. No, sir.

Q. Were you handed certain papers thereafter on that evening?

A. Yes, sir. I was handed additional bits of paper by the matron which she obtained from the clothes—— [635]

Q. Well, in any event——

Mr. Gladstein: I move the last part be stricken as a conclusion and opinion of the witness.

Mr. Schnacke: Yes, I have no objection to that being stricken.

Mr. Schnacke: Q. You were handed certain papers by the matron?

A. By the matron, which she told me——

(Testimony of Charles J. Prelsnik.)

Q. No, leave that part out.

I will show you two cellophane envelopes——

Mr. Schnacke: Pardon me just a moment (handing article to Mr. Gladstein.)

Mr. Schnacke: Q. I show you two cellophane envelopes in which there are certain bits of paper, and ask you if those are the bits of paper that were handed to you by the matron?

A. Yes, sir, they are.

Mr. Schnacke: I will ask that the two envelopes be marked Government's exhibit for identification, to bear the number next in order.

Mr. Gladstein: For identification?

Mr. Schnacke: For identification, yes.

(Thereupon the two envelopes referred to above were marked Government's Exhibit No. 116 for identification.) [636]

Mr. Leonard: Do both envelopes have the same number, Mr. Clerk?

The Clerk: Both have the same number.

Mr. Schnacke: No further questions, Mr. Prelsnik.

Cross Examination

Mr. Gladstein: Q. Mr. Prelsnik, when you received your instructions to place the defendant, Mrs. Blau, under your observation on the 27th of August, and when you proceeded, as you told the jury yesterday, to the place that you understood to be her residence, was that the first time you had seen her? A. Yes, sir.

(Testimony of Charles J. Prelsnik.)

Q. Were you with anyone that, to your knowledge, had previously seen her? A. Yes, sir.

Q. Who? A. Agent Shedd.

Q. And to your knowledge had Mrs. Blau been under surveillance and observation for some time before?

Mr. Schnacke: I will object to that as calling for a conclusion and opinion of the witness and not material in any way to the inquiry.

The Court: Well, it calls for hearsay. What you would say in answer to that is what somebody else told you? [637] A. That is right.

The Court: Sustain the objection.

Mr. Gladstein: Q. You had a photograph of Mrs. Blau with you? A. No, sir.

Q. You had a photograph you referred to yesterday?

A. It was given me by Agent Held.

Q. Oh. After he gave it to you did you have it in your possession? A. Yes, sir.

Q. Then you had a photograph of the lady at a time subsequently with or just about the time she came out of the house? A. Yes, sir.

Q. And by looking at the photograph and looking at her you felt that you were satisfied that that was—that the person whose photograph you had was the woman who was coming out of the house?

A. I had been given a description of her and I was watching the address at 69 North 10th Street,

(Testimony of Charles J. Prelsnik.)

and this woman coming out of the house answered the physical description I had.

Q. Who had given you the description?

A. It was given me——

Mr. Schnacke: I object to that as hearsay.

Mr. Gladstein: That is not calling for hearsay. It is a proper subject of inquiry, who the person was that gave him [638] the description.

Mr. Schnacke: I object to it as being immaterial.

The Court: Sustain the objection on the grounds of immateriality.

Mr. Gladstein: Q. What was the description that was given you of her?

A. That she was approximately 40 to 45 years of age; she was 5 feet 4 inches tall, weighed about 130 pounds, was slightly gray, large blue eyes, and neat in appearance. That was about it.

Q. Were you told you in the description given you that she was a brunette with slightly gray hair?

A. Yes.

Q. You weren't told she was a blond, were you?

A. No, sir.

Q. When you first saw her on the 27th of August did you observe what the appearance of her hair was? A. Yes.

Q. What was it?

A. It was—. You mean the color?

Q. Yes.

A. The color was brown with streaks of gray just as she is today.

(Testimony of Charles J. Prelsnik.)

Q. I think you said after she left her residence—. By the way, did you afterwards ascertain that that was her residence? [639]

A. Yes, sir.

Q. Did you go to the premises? A. Yes.

Q. Did you conduct a search of the premises?

A. Yes, sir.

Q. When was that?

A. The following day.

Q. Did you ever ask permission of Mrs. Blau to do that?

A. I had a search warrant to do it.

Q. I asked, did you ever ask her permission?

A. No.

Q. You say you did have a search warrant?

A. Yes, sir.

Q. When did you get it?

A. The following day.

Q. Who issued it?

A. The United States Commissioner.

Q. Where? A. San Francisco.

Q. On whose application? Yours?

A. No, sir.

Q. Do you know whose application?

A. No, sir.

Q. Now, after you saw her leave, you have described for us that she walked up some street and then sat down finally at [640] a bench. I take it that that was a street bench on the street corner of 13th and Julian? A. Yes, sir.

(Testimony of Charles J. Prelsnik.)

Q. And some time later an automobile came up and she got in it?

A. I didn't see that automobile come up.

Q. That was simply something that was relayed to you by—— A. Radio.

Q. Radioed to you by another car?

A. Yes.

Q. How many cars were involved in this assignment of yours that night? A. Three cars.

Q. How many agents altogether? A. Six.

Q. Two in each car? A. Yes, sir.

Q. All right. Then, in any event, you later on saw a green Chevrolet coupe? A. Yes, sir.

Q. And you saw Mrs. Blau in it?

A. Yes, sir.

Q. Now, at all times that you saw her in it, the man was the driver, wasn't he?

A. Yes, sir.

Q. Where was she seated? [641]

A. She was sitting alongside of him.

Q. And this man you have named today is a man named Harvey Wilson Richards?

A. Yes, sir.

Q. Then you told us that you and the other cars, I take it, followed the coupe until the time at about 7:35 when you stopped to make a phone call? A. No, sir.

Q. Oh, when you saw the man make a phone call, is that it?

A. I saw him go into a telephone booth.

Q. That was about 7:35? A. Yes, sir.

(Testimony of Charles J. Prelsnik.)

Q. Up to that time had the car stopped anywhere? A. Yes, sir.

Q. Where?

A. On a short distance after the crossing of the tracks at the Banta cut-off.

Q. That is the Banta cut-off, you say?

A. Yes.

Q. Is that a part of the main highway?

A. No, sir.

Q. What kind of roadway is it?

A. It is a—I would say it is a short-cut road. It is a paved highway. It is at least two or three —about three lanes.

Q. Three lanes? [642]

A. It is a short-cut between Livermore or San Francisco and Stockton.

Q. And considerably traveled, is it? If you know?

A. Well, yes, there are a lot of automobiles on it.

Q. Now, at 7:35 this man that you have identified as Harvey Wilson Richards went into a telephone booth. Where was that located?

A. Well, that was located a few miles this side of Stockton.

Q. When you say "this side", you mean towards San Francisco?

A. Towards San Francisco, yes.

Q. Just before Richards made that—went into that telephone booth, was the car headed in the direction of Stockton?

(Testimony of Charles J. Prelsnik.)

A. Well, as I testified yesterday——

Q. I say just before which way was it going, toward Stockton or away from Stockton?

A. Well, it was coming into US 50 at the time he parked the car.

Q. Which is the highway that goes directly into Stockton? A. Yes.

Q. That is No. 50, isn't it? A. Yes, sir.

Q. Now, while the man went into the telephone booth, what did you observe Mrs. Blau do?

A. She remained in the automobile.

Q. Do you know how long the man was in the telephone booth?

A. I would say approximately three or four minutes. [643]

Q. Of course you don't know who he called or whom he talked to? A. No.

Q. Or if he even made a call, is that it?

A. No, sir.

Q. Then he came back to the automobile and he resumed driving? A. Yes.

Q. And the car went in the direction of Stockton? A. Yes, sir.

Q. At 7:45 where did you see the car stop?

A. In front of a drive-in type restaurant just inside the city limits of Stockton, possibly a mile or two inside.

Q. Do you know what that place is called?

A. I don't recall the name of it, no, sir.

Q. Did you observe Mrs. Blau and the driver of the car go into the restaurant? A. Yes, sir.

(Testimony of Charles J. Prelsnik.)

Q. Did you have them under observation while they were there? A. Yes, sir.

Q. I think you told the jury yesterday that they were there some 20 or 25 minutes?

A. Yes.

Q. Did you see them eating?

A. Yes, sir.

Q. After they finished that, then I think you said that [644] they came out and got back in the car? A. Yes, sir.

Q. Started driving around some of the streets of Stockton? A. Yes, sir.

Q. Then did you say they took a road that had something to do with Mariposa? A. Yes, sir.

Q. What was that?

A. Well, that is a road that was described to us as being the Mariposa Highway. I don't know the number of the thing.

Q. Do you know where it leads to?

A. I believe it goes to Escalon. That direction.

Q. Do you know what the distance is between Stockton and Twain Harte? A. No, sir.

Q. Do you know what highway or highways connect Twain Harte and Stockton?

A. Well, I would be guessing. I couldn't say definitely.

Q. Well, don't guess. You don't know, is that right? A. That's right.

Q. Now, you say the automobile then went out on a highway just before you placed her under arrest, is that right?

(Testimony of Charles J. Prelsnik.)

A. Would you repeat that question?

Q. Yes, sir. Just before you placed Mrs. Blau under arrest, I thought I understood you to say that the Chevrolet coupe [645] had gone on to a highway outside of the city limits.

A. Yes. The Mariposa highway.

Q. The Mariposa Highway? Is that a well-traveled road? A. No, sir.

Q. Is it a county road? A. Apparently.

Q. Can you describe what its surfacing is like?

A. Yes, sir. I know it very well. It is a narrow, two-lane highway. It is a built-up highway, has rather steep embankments on each side; has a number of drainage ditches off of it.

Q. Number of what?

A. Drainage ditches that go through it and a number of culverts. They are rather closely spaced. Cement type culverts.

Q. And is this area where the car was traveling, say, within the last couple of minutes, within the last five minutes prior to the making of the arrest, is that a country or rural area?

A. Yes, sir.

Q. Is there any lighting there?

A. No, sir.

Q. And there wasn't any that night?

A. No, sir.

Q. As you were going along just before the arrest, were any of these three automobiles you have told us about, that is, the automobiles in which the

(Testimony of Charles J. Prelsnik.)

agents were riding, were any of them in front of the Chevrolet? [646]

Q. Would you repeat that question?

Q. Yes, sir. The green Chevrolet was the one in which Mrs. Blau was riding, is that right?

A. Yes, sir.

Q. You have told us there were three automobiles of FBI agents, two in each?

A. Yes, sir.

Q. Who were keeping the Chevrolet under observation? A. Yes, sir.

Q. My question to you is, within the last five minutes prior to the arrest—— A. Yes, sir?

Q. ——was any of the FBI cars in advance or in front of the Chevrolet? A. No, sir.

Q. Then all three cars were behind and following it? A. Yes, sir.

Q. Can you tell us who the agents were in the lead car, that is, the most advanced of the three automobiles the agents were in?

A. Agents Shedd and Murphy.

Q. Agents Shedd and Murphy? And who was in the second? A. Held and Berryman.

Q. Do you know how to spell that second name?

A. B-e-r-r-y-m-a-n. [647]

Q. And in the third?

A. Strawman and myself.

Q. Strawman and yourself? A. Yes, sir.

Q. Now, can you tell us what distance Agents Shedd and Murphy kept between themselves and

(Testimony of Charles J. Prelsnik.)

the Chevrolet they were following, or that was in front of them?

A. Well, I couldn't tell you the exact distance, no, sir.

Q. Can you give us an approximation?

A. You are speaking of the last five minutes?

Q. Yes.

A. From the time we left the intersection of the main highway, which I testified to yesterday, would be the last five minutes. The defendant's car began picking up speed——

Q. You mean the car in which the defendant was riding?

A. Defendant was riding. Began picking up speed, and up until that time, why, we stayed back what we thought was a respectable distance.

Q. What is a respectable distance when you are following someone?

A. Well, the distance where we think we will not be observed.

Q. I am sure that is your purpose, but I wanted the jury to know and all of us to know what it is in feet that you actually maintain?

A. Well, we don't approximate that. Conditions of the [648] highway and time of day, and so forth, would determine that.

Q. Oh, I understand that under different conditions it might be a different distance, but on this occasion—on this occasion, during the last five minutes after the Chevrolet left the intersection in Stockton and went out on the Mariposa road and

(Testimony of Charles J. Prelsnik.)

prior to the arrest, what was the approximate respectable distance that Mr. Shedd and Murphy kept between themselves and the Chevrolet?

A. Oh, we stayed as closely to them as we thought safe from the standpoint of safety.

Q. How far, sir?

A. Well, a car that is travelling 60 miles an hour or 65 miles an hour in front of you, why, you will stay back a reasonable distance because you wouldn't want to run into it.

Q. What is a reasonable distance? Two or three hundred feet?

A. That would depend on the driver.

Q. Well, what was it that night?

A. Oh, I would say possibly a couple of hundred feet.

Q. All right, a couple of hundred feet. Now, however—withdraw that.

Of course the car that Mr. Held and Mr. Berryman were in had to keep a safe distance behind the car in front of them, didn't they?

A. That is right.

Q. Can you tell us approximately how far behind the car [649] that Agent Shedd was driving, or Murphy, the car was that Held and Berryman were in?

A. Well, they were quite close, practically bumper to bumper.

Q. Bumper to bumper? A. Yes, sir.

Q. Well, give us your best recollection all the way along.

(Testimony of Charles J. Prelsnik.)

A. This is the last five minutes that you are speaking of?

Q. Yes, again the last five minutes on the Mariposa highway.

A. Yes. We were as close together as we could be.

Q. What was the distance between the car you were in and the car Mr. Held and Mr. Berryman were in? A. Same distance.

Q. Same distance? Were you driving?

A. Yes, sir.

Q. Would you say, then, that you were traveling about 60 or 65 miles an hour? A. Yes.

Q. Well, you weren't closer than 50 feet to the automobile in front of you, were you?

A. I would say I was as close as from here to the end of this room.

Q. Well, that is probably between 40 and 50 feet, although we can measure it. That is your approximation? A. Yes, sir.

Q. And would you say that the distance between the car that [650] Officer Held was in and the car in front of him, that is, the car Officer Shedd was in, was about the same distance as one end of this courtroom to the other? A. Possibly.

Q. Well, is that your best approximation?

A. That is a guess.

Q. I don't want you to guess. I want you to give me your best recollection.

A. Well, that is my best recollection.

Q. That is what I want. So it would be three

(Testimony of Charles J. Prelsnik.)

or four hundred feet or more between you and the automobile Mrs. Blau was riding in, is that correct?

A. That is right.

Q. Now, along that highway, Mariposa highway, during the last five minutes was there any artificial lighting at all?

A. No, not that I recall.

Q. The only lights then, were the headlights of your automobiles? A. That is right.

Q. What time did you make the arrest?

A. Oh, I would say it was approximately between 8:30 and a quarter to nine.

Q. Were we on daylight saving time on that day? A. I believe we were, yes, sir.

Q. Was there any light of the moon?

A. No, sir. [651]

Q. The moon had not risen yet?

A. Not that I recall, no, sir.

Q. And the sun had completely set, had it not?

A. Yes, sir.

Q. Did I understand you to say that under those circumstances, as you were traveling along, you saw some small bits of paper coming out of the Chevrolet automobile? A. Yes, sir.

Q. You saw that? A. Yes, sir.

Q. Although there were two cars in front of you, between you and the Chevrolet?

A. Yes, sir.

Q. And you saw these bits of paper coming from both sides of the Chevrolet? A. Yes, sir.

Q. And you saw all that unaided by anything

(Testimony of Charles J. Prelsnik.)

at all but your own ability to see ahead some 300 or more feet in complete darkness?

A. No, sir.

Q. Not complete darkness? A. No, sir.

Q. You mean the headlights of the cars were on?

A. The headlights of Mr. Shedd's car.

Q. The headlights of Mr. Shedd's car? [652]

A. Yes.

Q. Did you stop or require anybody else to stop and look around for these pieces of paper in that area? A. Yes, sir.

Q. And did you find any?

A. The following day we went out to the approximate area and looked for it and didn't find any, no, sir.

Q. When I say "little pieces of paper", I mean the same kind that Mr. Schnacke showed you today that you said were on the person of Mrs. Blau. You were looking for similar bits of paper to this?

A. Yes.

Q. Along the course traveled by the Chevrolet during the last five minutes there you were unable to find any others? A. Yes, sir.

Q. Now, was it you who—I think, if I understood your testimony rightly, it was you who transmitted the instructions to Officer or Agent Shedd to close in and make an arrest?

A. Yes, sir.

Q. And did you tell him who to arrest?

A. I told him to close in and stop the car, and

(Testimony of Charles J. Prelsnik.)

that the only person we would arrest in that automobile was the defendant.

Q. Is that the language you used, "the defendant"? A. Well, Mrs. Blau. [653]

Q. Tell us what you told him?

A. I told him the only person we would take into custody would be Mrs. Blau.

Q. Not the man who was driving the car?

A. No. We didn't know who the man was, or I didn't know who the man was.

Q. And you never did place him under arrest?

A. No, sir.

Q. And you didn't take him into custody?

A. I told Richards that he was free to go, but if he wanted to come in with us he was welcome to ride in with us, and he came along with us.

Q. Now, when the car was stopped, did you come up and talk with Mrs. Blau?

A. Yes, sir.

Q. Did you tell her at that time what she was under arrest for? A. Yes, sir.

Q. What did you tell her she was under arrest for?

A. I told her she was under arrest for aiding and abetting Bureau fugitives—Federal fugitives were my words.

Q. That is what you said to her?

A. Yes, sir.

Q. Did she ask you who you were talking about?

A. No, sir. [654]

Q. Did she ask you—. May I ask you this:

(Testimony of Charles J. Prelsnik.)

Isn't it true you said to her, either then or later, that you were arresting her for harboring somebody?

A. I possibly asked her about that then, yes, sir.

Q. No, my question is, isn't it true you said to her you were arresting her for harboring someone?

A. I could have said it, then. I probably said it later.

Q. Isn't it true that is the only thing you said you were arresting her for was harboring somebody, and you didn't say anything at all about aiding and abetting? A. No, sir.

Q. Did you place a charge against her?

A. Yes.

Q. Where?

A. Well, I placed the charge—I didn't place the charge against her.

Q. Well, but the agents did?

A. She was booked on route to the United States Marshal.

Q. What was the charge placed against her?

A. I would have to consult the record.

Q. Don't you know that you placed a charge against her of harboring and nothing at all about aiding and abetting federal fugitives?

A. That is probably true. My instructions were——

Q. I beg your pardon? [655]

A. May I tell you more on that?

Q. Yes, you can.

A. My instructions for arresting her was that

(Testimony of Charles J. Prelsnik.)

she was to be arrested for harboring and for aiding and abetting Federal fugitives, as an accessory after the fact. Those were my instructions.

Q. Did you do so?

A. I placed her under arrest for aiding and abetting Federal fugitives.

Q. You say you placed her under arrest. But a charge was made against her, was it not?

A. Yes.

Q. And that charge is made under oath in the form of a complaint, isn't it? A. Yes.

Q. And that was done in her case?

A. That was before the United States Commissioner.

Q. I say that was done in her case, was it not?

A. Yes, sir.

Q. After the arrest was made? A. Yes.

Q. And who was the United States Commissioner?

A. The United States Commissioner at Stockton. I have forgotten her name, right now.

Q. Isn't it a fact the only charge made against her in that [656] instance, which was made before the United States Commissioner was a charge of harboring? A. No, sir.

Mr. Schnacke: I don't think that is the fact. In any event, this witness said he wasn't aware of the filing of that complaint. He wasn't there. He didn't make the oath. It seems to me you are asking for hearsay after this witness has told you he doesn't know about it. There is a record on that.

(Testimony of Charles J. Prelsnik.)

The Court: The record is always the best evidence. Why waste a lot of time talking about what people say when there are documents? If it is important, the documents can be brought here.

The Witness: Your Honor, I was confused on that question of how she was booked. She was booked at Stockton, at the San Joaquin County jail, on route to the United States Marshal.

That is what I thought you meant, Mr. Gladstein. So far as filing the complaint is concerned, that was a different matter.

Mr. Gladstein: Q. Did you sign the complaint?

A. Yes.

Q. Do you know what you signed?

A. Yes.

Q. And in the complaint you signed against her, you charged her with harboring, did you not?

A. And as an accessory after the fact. [657]

Q. You did? A. Yes, sir.

Mr. Gladstein: I don't know where that original warrant is, but I would like it produced—complaint, I mean.

The Court: I don't see the materiality of it, but you can have it in court if you wish.

Mr. Gladstein: Yes, I should like to have it.

The Court: The jury is trying this case on the indictment.

Mr. Gladstein: Well, there isn't—there is a valid purpose in my request. In any event, I understand the Court is granting my request?

The Court: Granting what request? If you show

(Testimony of Charles J. Prelsnik.)

the materiality of having someone send someone down—. Where is the complaint filed? In Stockton?

The Witness: Stoekton.

The Court: If you show the materiality of producing a document from Stockton——

Mr. Schnacke: I think it is part of the court file, Your Honor.

The Court: Then if it is, it is accessible to the defendant. I don't have to order anything done about it.

Mr. Gladstein: Will you look and see if it is in the court file?

Mr. Gladstein: Q. When you brought Mrs. Blau into Stockton, I think you told us she was taken to the Post Office [658] Building there?

A. Yes.

Q. That is the building that contains the FBI offices? A. Resident agency, yes, sir.

Q. And it was there that you said to her you were going to ask—in effect, you were going to ask her some questions but she need not say anything?

A. Yes.

Q. And she chose, almost without exception, to take you at your word and not answer your questions, isn't that right? A. Yes, sir.

Q. Except that she told you, either in writing or orally, that she had taken and was going by the name of Janet Conroy?

A. Identification was made.

Q. And you checked on that later, did you not?

A. Did I verify those two cards?

(Testimony of Charles J. Prelsnik.)

Q. Yes. A. No, sir.

Q. Didn't you check to verify whether it was true that she was living in San Jose as Janet Conroy, working as Janet Conroy? A. Yes, sir.

Q. That is true, isn't it? A. Yes.

Q. She had taken that name and was using it for all purposes, [659] isn't that right?

A. Yes.

Mr. Gladstein: Would Your Honor give me a moment?

Mr. Gladstein: Q. Was it at the Post Office Building that Mrs. Blau's person was searched?

A. No, sir.

Q. Had she been searched before that?

A. Only a search when she was taken out of the automobile, when we first stopped the car, to determine whether or not she had a weapon or anything like that. Just a precaution we take on any prisoner we take in custody.

Q. And what did you find as a result of searching her?

A. All we looked at was her handbag. We found nothing at that time.

Q. Did you search the driver of the car?

A. No, sir, only for the same reason, to determine whether he had any weapons.

Q. Then you did search him to see if he had a weapon? A. Yes.

Q. You found he had no weapon?

A. That is right.

Q. Now, some time later, as I understood you,

(Testimony of Charles J. Prelsnik.)

or as I understood Mr. Schnacke's questions, you did conduct some kind of search of Mrs. Blau, didn't you? A. Yes, sir. [660]

Q. Where was that?

A. At the San Joaquin County jail.

Q. Now, up to that time did you have any warrant for the arrest of Mrs. Blau?

A. No, sir.

Q. Did you know or were you told by anyone whether there was any warrant outstanding for her arrest?

A. I was told there was no warrant outstanding for her arrest.

Q. Now, at the jail, at what part of the jail was this search conducted?

A. At the desk. The desk sergeant. It is known as the booking desk at the San Joaquin county jail.

Q. Who was present when the search was being made? A. The matron.

Q. Yes?

A. And the desk sergeant, both of the San Joaquin County jail, and myself; Agents Murphy, Berryman and Held.

Q. And tell us what the search consisted of at that time in the presence of those people that you have named?

A. The matron asked for her purse, and I had the defendant open up her purse and spill the contents out on the counter. I had her identify various articles in the purse, open up the compact and things like that which I didn't want to open.

(Testimony of Charles J. Prelsnik.)

And there was the matter of some money. Had her identify [661] the contents of the purse, which she did, and then as we were examining in the contents of the purse the matron continued her search of the defendant.

Q. What did she do in continuing that search?

A. Well, she obtained a handful of bits of paper which she gave to me from her person.

Q. Where did she obtain them from?

A. From the blouse of her dress.

Q. You told one of the agents or the matron to remove Mrs. Blau's blouse, didn't you?

A. No, sir.

Q. Was it removed?

A. I don't know. It wasn't in my presence, no, sir.

Q. Didn't you say it should be removed?

A. Yes, sir, I told the matron I didn't want her searched any further there, but that I wanted a strip search of her conducted, and the matron took her from the instant quarters to another room.

Q. Didn't that happen, after you had first told the matron to remove her blouse and Mrs. Blau——

A. (interposing) No, sir.

Q. Just a second until I finish my question. Mrs. Blau objected to that, and you said you could search her anywhere you wanted to, and she still objected, and after that you told the matron to remove her, isn't that true? [662] A. No, sir.

Q. But you were present when you say the matron removed some bits of paper from her?

(Testimony of Charles J. Prelsnik.)

A. The matron handed me bits of paper which she said she took from her person.

Q. So you didn't see that? A. No.

Q. You didn't see where the matron got the bits of paper? A. No, sir.

Q. On how many occasions did the matron hand you bits of paper? A. Two.

Q. Two? So on neither occasions, then, did you see where the matron got these bits of paper?

A. No.

Q. Is that right? A. That is correct.

Q. Did you ask Mrs. Blau to sign anything?

A. No, sir.

Q. Were you present when any agent did?

A. No, sir.

Q. Did you threaten to throw her in the drunk tank? A. No, sir.

Q. Were you present when an agent did?

A. No, sir. [663]

Q. Now, just one or two questions: I think you have told us you arrested Mrs. Blau on the 27th of August, and that on the 28th you obtained a search warrant to search her premises, did you not?

A. I don't remember whether it was August 28th. Might have been the day following—that day or the following day.

Q. Well, in any event, you arrested her on the 27th and went there on the 28th or 29th?

A. Possibly.

Q. You got a search warrant? A. Yes.

Q. Is it also true you went there on the 28th or

(Testimony of Charles J. Prelsnik.)

29th, that is, a day or two after you arrested her, you got a warrant of arrest for her?

Mr. Schnacke: I don't know what the materiality of this is. If there is any, I won't raise any objection.

Mr. Gladstein: Q. What is your answer?

A. On the 28th I filed a complaint—an authorized complaint.

Q. But you took her into custody on the 27th and placed her under arrest? A. Yes.

Q. And either the day after that or the day after that you got that warrant for her arrest?

The Court: Well, he didn't need it. She was already arrested. [664]

Mr. Gladstein: Your Honor, I am not so sure that is correct as a matter of law, but in any event as a matter of the proper examination of the witness I believe I am entitled to show that they arrested her without lawful process and then obtained process for the purpose of trying to validate what, as I see it, they had tried to do in the first place.

The Court: I think you are entirely incorrect. It is merely an argument of law, and I instruct the jury not to pay any attention to it; and I also tell the jury it is of no consequence at this point in this case.

Mr. Gladstein: May I have an answer to it?

The Court: Did you make an objection?

Mr. Gladstein: He said he had no objection.

(Testimony of Charles J. Prelsnik.)

Mr. Schnacke: I will raise the objection. I think it is completely immaterial.

Mr. Gladstein: I didn't hear Your Honor's ruling. Are you waiting for the witness' answer?

The Court: There has been no objection.

Mr. Schnacke: I did raise the objection as to its being immaterial.

The Court: Oh, I misunderstood you. Sustain the objection on the ground it is incompetent, irrelevant and immaterial.

Mr. Gladstein: Q. Now, when you went back on the 28th or 29th to search the premises of Mrs. Blau, did you take [665] anything into your possession from the premises?

Mr. Schnacke: I will object to that as being outside the scope of the direct examination and immaterial.

The Court: Sustained.

Mr. Gladstein: Q. Did you search the garbage can?

Mr. Schnacke: Same objection.

The Court: Same ruling.

Mr. Gladstein: Q. Did you find any cans of beer there?

Mr. Schnacke: Same objection.

The Court: Now, Mr. Gladstein, don't—. I will sustain the objection.

Mr. Schnacke: Your Honor please, I will withdraw the objection to that last question.

The Court: Well, move along with the case, now.

(Testimony of Charles J. Prelsnik.)

Mr. Schnacke: I think there may be materiality to it.

The Court: All right.

Mr. Schnacke: And I think it is a proper question and I will withdraw the objection. [666]

Mr. Gladstein: Q. His Honor has ruled. You may answer the question. A. No, sir.

Q. You didn't? Did you look for cans of beer?

A. No, sir.

Q. Did you look for anything that might bear Mrs. Blau's fingerprints? A. No, sir.

Q. Did you take any impressions or have anybody come and take impressions of latent fingerprints? A. No, sir.

Q. Who were you with?

A. Agent Murphy.

Q. How long were you there?

A. Thirty minutes.

Q. I beg your pardon?

A. Thirty minutes.

Q. What, if anything, did you take from the premises?

Mr. Schnacke: I will object to that as being immaterial in view of the defendant's answer—the witness' answer, rather, that he did not remove beer cans. I think anything beyond that is immaterial.

The Court: I will overrule the objection.

Mr. Gladstein: Q. What, if anything, did you remove from the premises, sir? [667]

A. As I recall, *as* we took was blank check stubs.

Q. Blank check stubs?

(Testimony of Charles J. Prelsnik.)

A. Blank checks. Blank checks, rather.

Q. Well, did you take those stubs that showed that checks had been made, filled out?

A. No, sir.

Q. Just blanks?

A. Yes. Cancelled checks.

Q. Oh, then you did take cancelled checks?

A. Yes.

Q. That is what I wanted to know. So they weren't blanks at all?

A. No, no. I meant they were checks.

Q. On what bank were those checks?

A. The American Trust Company in San Jose.

Q. And whose signature appeared as the maker of those checks? That is, the name?

A. Janet Conroy.

Q. How many such checks did you take into your possession? A. I don't recall.

Q. What did you do with them?

A. I gave them to Agent Murphy.

Q. Were they ever returned to Mrs. Blau, to your knowledge? A. I don't know.

Q. Did you check at the bank on which these checks were [668] drawn?

Mr. Schnacke: I think that is getting pretty remote, Your Honor.

Mr. Gladstein: I will withdraw it.

Mr. Schnacke: I object to it as being immaterial.

Mr. Gladstein: Q. Did you take all the cancelled checks that you found at the premises?

A. No, sir.

(Testimony of Charles J. Prelsnik.)

Q. You left some?

A. All that—I just took a couple of them, as I recall.

Q. You took some and left others?

A. Yes, sir.

Q. Is that your testimony? A. Yes, sir.

Q. How many did you take?

A. As I remember, two of them.

Q. Do you remember where those checks are?

A. No, sir.

Q. Do you remember anything about them?

A. No, sir.

Q. Do you remember to whom they were made out? A. No, sir, I don't remember.

Q. But you do recall they appeared to be signed by Janet Conroy? A. Yes. [669]

Q. Were you looking for those particular two checks or did you just take those as samples?

Mr. Schnacke: I think that goes to his state of mind and what he was looking for. He said what he was doing. I think that is immaterial and I object to it.

The Court: Sustained.

Mr. Gladstein: Q. Were you searching, I mean——

Mr. Gladstein: I am not interested in his state of mind but the purpose of the search.

Q. Were you searching for some particular check or checks?

Mr. Schnacke: I think the only inquiry into that can go into the status of the search warrant. There

(Testimony of Charles J. Prelsnik.)

is a search warrant in the record. Why doesn't he examine the record on that? I think this is immaterial.

The Court: You say there is a record on it?

Mr. Schnacke: The witness has testified there was a search warrant. A search warrant is issued as a public fact and is a public record.

Mr. Gladstein: Q. Did you make a record of the results of your search and what you took?

A. I don't recall. We went there looking for certain checks but we didn't find those checks.

Q. Oh, you were looking for some particular check? A. That is right.

Q. What checks were you looking for? [670]

A. I don't recall.

Q. You were looking for checks, weren't you, that might show some transaction between Mrs. Blau, using her name of Janet Conroy, and any other persons up at Twain Harte, weren't you?

A. That is correct.

Q. Yes. And you didn't find any such, did you?

A. No, sir.

Q. Now, I will ask you once more: Did you or, to your knowledge, did one of your fellow agents make a return that is a matter of record somewhere as to what you took from the premises?

A. I don't recall.

Mr. Gladstein: Do you know, Mr. Foster? I am told by Mr. Foster there was such a return, and with that answer I have no further questions.

The Court: Anything else?

(Testimony of Charles J. Prelsnik.)

Mr. Schnacke: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Schnacke: Shall I start with another witness now, Your Honor?

The Court: Yes, let's go ahead.

Mr. Schnacke: Miss Collins. [671]

IDA COLLINS

called as a witness on behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court and to the jury? A. Ida Collins.

The Clerk: Collins, C-o-l-l-i-n-s?

A. That is right.

Direct Examination

Mr. Schnacke: Q. Miss Collins, where do you reside? A. I beg your pardon?

Q. Where do you live?

A. I live at Stockton, California.

Q. Are you employed?

A. I am employed, yes, sir.

Q. What is your occupation?

A. I am a matron at the San Joaquin County Jail.

Q. And was that your employment on August 27th of last year? A. Yes, sir.

(Testimony of Ida Collins.)

Q. And were you on duty on the evening of August 27th of last year? A. I was.

Q. On that evening did you have occasion to attend the booking of a Janet Conroy? [672]

A. I did, yes, sir.

Q. Do you recall who was present at the time Miss Conroy was booked?

A. We had two FBI men who came in with her. I don't know their names. I would recognize them. This gentleman here (indicating), and a heavy-set man. I don't see him in here now, Shelby, I think they called him.

Q. Well, there were two FBI men?

A. Two that I remember.

Q. And one of them, you say, was Mr. Erickson—— A. Yes.

Q. ——sitting at the table here? Well, you don't recall their names? A. I do not know, no.

Q. And this was on the 27th?

A. 27th of August.

Q. And was there a booking officer there, some representative of the jail?

A. Of our jail? There was.

Q. And who was that?

A. Mr. Darby, our fingerprint man, was there and—. Can I look at my record?

Q. Yes, sure.

A. Robert Berryman, one of our men. No. I don't recall our men, who the boys were, but the boys in the booking department, [673] Mr. Darby was there, but I don't remember what other deputy.

(Testimony of Ida Collins.)

Q. On that occasion did you make a search of the Janet Conroy that was brought in?

A. Yes, sir, I did.

Q. And was that search made in the presence of the men or was that made somewhere else?

A. When we book our prisoners we check their pockets and I turn the prisoners back to the men present, and I checked the bra and, if necessary, why, I take them upstairs for further check, which I did do.

Q. Which you did do in this case?

A. I did do, yes.

Q. Now, in the check of a prisoner's bra, did you discover anything? A. I found papers.

Q. And what did you do with those papers?

A. I took them from the bra in my hand, and turned and I laid them on the booking desk.

Q. Do you know who took them?

A. The FBI man picked them up.

Q. Then you say you took the lady, Janet Conroy, to some other place and conducted a further search?

A. I took her upstairs to the women's quarters, into our office, and took her clothes and shook them out and these other papers fell out. They were picked up, placed in an envelope [674] and taken down to the man from the FBI.

Q. Were any of the men present in that room?

A. No, sir, just my trusty and me.

Q. And your trusty, I take it, is a lady?

A. Is a lady, yes, sir.

(Testimony of Ida Collins.)

Q. And those papers that dropped on the floor, what did you do with them, Miss Collins?

A. They were picked up, put into an envelope and handed over to the FBI.

Q. The same man that you had——

A. (Interposing) I took them downstairs myself and turned them over.

Q. Now, Miss Collins, you have seen Mr. Erickson here on a number of occasions since August 27th of last year, have you not? A. Yes, sir.

Q. Are you quite certain that he was one of the agents that was present on the evening of August 27th?

Mr. Gladstein: I object to this as an effort to impeach his own witness, if Your Honor please.

Mr. Schnacke: I just wanted the record clarified on that point and to be certain. If you object, I will withdraw the question.

The Court: All right.

Mr. Schnacke: No further questions, Miss Collins. Thank you. [675]

Mr. Gladstein: Just a moment, Miss Collins.

Cross-Examination

Mr. Gladstein: Q. Who was this Mr. Darby that was present?

A. He was one of our deputies in our FBI department, and he does the printing and photography work in our FBI department of our county.

Q. What I am trying to find out is, this Mr.

(Testimony of Ida Collins.)

Darby, was he with the FBI or is he with the San Joaquin County?

A. He is with the San Joaquin County.

Q. I see. A. M-hm.

Q. You have known him for some time, have you?

A. Have I? Yes, I have worked with him for some time, yes.

Q. Do you know what hours he regularly keeps there?

A. Well, he works around the clock, different hours, different shifts. We work eight hours to a shift and each month they change. If he was on that night at 10:15, he must have worked from four until twelve.

Q. Did you have a fingerprint man at all times around the clock at the San Joaquin County Jail?

A. Except sometimes on Sunday we do not have.

Q. What about weekdays, say Tuesdays?

A. Yes, they have. [676]

Q. Who are the three fingerprint men who work the three shifts around the clock?

A. Oh, I can't tell you their names. They have different ones up there. I can't tell you the names offhand.

Q. Can you give me the name of anybody but Mr. Darby? A. Mr. Paul Monton.

Q. And he is also a fingerprint man?

A. He is the head of our department.

Q. He is the head of what, ma'am?

A. He is the head of our department.

(Testimony of Ida Collins.)

Q. Is he a fingerprint man?

A. Yes, sir.

Q. And who else?

A. Oh, my, I don't think of their names now.

Q. What time did you go on duty that day or that night?

A. I went on duty between 3:30 and 4:00. My hours are 4:00 to midnight and I go a little bit early.

Q. Do you know when Mr. Darby went on duty that day?

A. I do not, but I presume he went on the same hours I did, 4:00 to 12:00. I presume that is so. I am not sure.

Q. It is possible that he came specially for this, isn't it? A. I couldn't say.

Q. Now, was one of the FBI agents, the heavy-set one, who was with you at the time of the booking and the search you have stated that you took Mrs. Blau away upstairs—a man by the [677] name of Prelsnik?

A. It could have been. There were several men there. We had other prisoners in there at the same time. We had other deputies and other men, and there were several men there. I couldn't tell you their names. I do not know.

Q. Well, did you see a man leaving the court room just as you were coming into it that you recognized as being one of the FBI agents who was with you on the night of August 27th?

(Testimony of Ida Collins.)

A. I didn't notice the man going out as I came in.

Q. Were you in the witness room earlier today? A. Yes, I was.

Q. Did you see a Mr. Prelsnik, a man whom you recognized as being one of the FBI agents on August 27th, in that witness room this morning?

Mr. Schnacke: It will be a little hard. He was on the witness stand when we started this morning.

Mr. Gladstein: I don't mean when court commenced. I mean before ten o'clock, out there in the witness room.

The Witness: A. I don't remember.

Mr. Gladstein: Q. You don't remember that?

A. No.

Q. Well, whatever the man's name was, when you first started the search of Mrs. Blau, what was the first thing that was searched?

A. We took her pocketbook, her purse. [678]

Q. And who do you mean by "we"?

A. I took her pocketbook.

Q. What did you do with it, ma'am?

A. I put it on top of the booking desk, opened the purse and started to take the contents out of the purse, laid them on the desk, and they were checked on our booking slip by our booking agent.

Q. That was all in the presence of the FBI agents? A. Yes, sir.

Q. And what was the next thing that you did?

A. Well, then I went through her pockets, and then I looked in her bra and I found the papers,

(Testimony of Ida Collins.)

and they said, "You better take her upstairs and give her a more thorough search."

Q. When you say "they", you mean the FBI agents? A. That is right.

Q. And the search you did conduct of her bra was in the presence of these agents, wasn't it?

A. Yes, sir, but not facing them.

Q. You turned her around?

A. Turned the lady around, yes.

Q. When you brought your hand forth out of her bra, you said you had this paper in it?

A. Yes, and I laid them on the desk.

Q. You laid them on the desk in the presence of the agents? A. Yes, sir. [679]

Q. And they were looking at you and they saw it? A. Yes. They picked them up.

Q. Did you tell the agents you had found those bits of paper on Mrs. Blau's person?

A. Did I tell them I found them?

Q. Yes? A. They saw me do it.

Q. That is what I wanted to know. You didn't tell them you found them on her?

A. They saw me take them off her and put them on the table.

Q. Then you took her upstairs, is that right?

A. That is right, yes.

Q. Were you present when she was told to sign some papers of some kind?

A. I was, yes, sir.

Q. Were the FBI agents present, too?

A. No, sir.

(Testimony of Ida Collins.)

Q. Oh. Who was there at that time?

A. Mr. Darby and myself.

Q. I see. Was it said to her if she didn't sign some paper she would be put in the drunk tank?

A. Well, they said to her, "The rule is that you sign these papers. If you don't, it might be that they will put you in the drunk tank."

Mr. Gladstein: That is all. [680]

Mr. Schnacke: That is all.

Mr. Gladstein: Oh, just one more question:

Q. She didn't appear to be drunk, did she?

A. I beg your pardon?

Q. Mrs. Blau didn't appear to be drunk at that time, did she?

A. No, not in my presence, she didn't. Not to my knowledge.

Mr. Gladstein: That is all.

(Witness excused.)

The Court: Members of the jury, we will take the mid-morning recess.

(Short recess.) [681]

HARRY L. SOTZIEN

called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. Harry L. Sotzien.

Q. How do you spell your last name?

A. S-o-t-z-i-e-n.

Direct Examination

Mr. Foster: Q. Mr. Sotzien, what is your occupation? A. I am meat cutter, sir.

Q. Butcher? A. Butcher.

Q. And who is your employer?

A. Mr. Mike Lackey.

Q. And does he own a grocery store in Twain Harte, California? A. Yes, sir.

Q. Did you work for Mr. Lackey in the summer of 1953? A. I did.

Q. In the store in Twain Harte?

A. Yes, sir.

Q. Now as part of your duties in the store do you have anything in your ice box except meat?

A. Oh yes, I had——

Q. And do you distribute things from your ice box? A. Yes, sir.

Q. To customers? A. Yes, sir.

Q. Drawing your attention to the latter part of June, July and August of 1953, did you fill any orders for sour cream? A. Yes, sir.

(Testimony of Harry L. Sotzien.)

Q. To many people? A. No, sir.

Q. To more than one person?

A. No, sir.

Q. In other words, you had only one order for sour cream? A. That's right.

Q. During the summer of 1953?

A. That's right.

Q. Can you describe the person who bought that cream?

A: Well, it was a dark-complected lady.

Q. Young or old?

A. Well, young woman.

Q. And did she buy many other things from you, Mr. Sotzien?

A. She bought from me, yes, sir.

Q. How often would you say?

A. Well, I would say two to three times a week.

Q. And what were the size of her orders? [683]

A. Well, sometimes they were of great size, other times not so large.

Q. Do you recall what size?

A. Well, $10 to $12 orders.

Q. Do you recall what kind of cuts of meat they were?

A. They were all good cuts.

Mr. Gladstein: If Your Honor please, the information about the lady's bill is immaterial and irrelevant, whether she bought good cuts of meat or not good cuts of meat is incompetent, irrelevant and immaterial.

The Court: Except, I suppose, as to quantity.

(Testimony of Harry L. Sotzien.)

Mr. Foster: To tell the complete story.

Mr. Gladstein: He is asking about the quality of cuts; he wanted to know what kind of cuts of meat they were.

Mr. Foster: Q. What kind of meat was it?

Mr. Gladstein: I am going to object to that, if Your Honor please, whether it was——

The Court: I will overrule it.

Mr. Foster: Q. What kind of cuts of meat?

A. Well, they were the best I had, the best in beef.

The Court: That doesn't mean anything.

The Witness: A. Well, New York steaks, top sirloins, porterhouse steaks.

Mr. Gladstein: I am going to move that that be stricken, if Your Honor please, as incompetent, irrelevant and immaterial [684] and introduced only for an improper purpose and intended to be prejudicial and inflammatory. I object to it.

Mr. Foster: If Your Honor please——

The Court: I don't think there is anything inflammatory about that.

Mr. Gladstein: If Your Honor please, I have made my objection.

The Court: Well, I will overrule it.

Mr. Foster: Q. Now, Mr. Sotzien——

The Court: The jury is not to draw any inferences. I don't know of anything inflammatory about them. The jury is instructed that it is not inflammatory.

Mr. Foster: If Your Honor please, I will just

(Testimony of Harry L. Sotzien.)

offer that testimony for the purpose of showing the remembrance of the man of the customer.

Mr. Gladstein: I didn't hear that. What was that?

The Court: Read it.

(The reporter read the remark of counsel.)

Mr. Gladstein: Your Honor, we are not interested in his remembrance about the kind of meats that were bought. If he wants to have him identify who the person was, I will not object, but what difference does it make what kind of cuts of meats were bought? I object to it.

Mr. Foster: Q. Mr. Sotzien, now will you see if you can identify at the defendants' table——

A. I am positive I can, yes, sir.

Q. (Continuing) ——the person who you sold the meat to? A. Yes, sir.

Q. Can you identify her? A. Yes, sir.

Q. Where is she?

A. The lady with the red on her clothes, and glasses.

Mr. Foster: May the record show that the witness has identified the defendant Shirley Kremen.

No further questions.

Mr. Gladstein: I move that the testimony except for the identification and the identifying data of the witness which places him as a butcher, be stricken.

The Court: I will deny that motion.

The Court: Q. So there won't be any question

(Testimony of Harry L. Sotzien.)

about this witness, will you describe the kind of meat, would you tell us the quantity of meat.

A. Well, there was different sales at different times; they were sometimes big orders and sometimes they were not.

Q. That is confusing; how much?

A. I would say from—all the way from four to twelve or fifteen dollars in amounts.

Q. In amounts? A. Yes.

Q. Of course that again wouldn't mean anything. [686]

A. You understand that when I put up the order I handle no cash; I wrap the packages and they take it up front and then it is checked out through the front end.

Q. Is that the best you can tell us as to the quantity of meat? A. That is right.

Q. Irrespective of what kind of cut it was?

A. It would run from four to fifteen dollars at different times, different occasions.

The Court: Is there anything else you want to ask him?

Mr. Gladstein: Yes, I think I will ask him.

Cross Examination

Mr. Gladstein: Q. When were you first contacted by any representative of the F.B.I. regarding this testimony?

A. Well, let's see; I don't remember just what date.

Q. Just approximately when?

(Testimony of Harry L. Sotzien.)

A. July, I'll say.

Q. July. Would it help you any if I were to say to you that it is the fact established here that the lady whom you identified here this morning was arrested at Twain Harte on August 27th? With that in mind can you tell us when the F.B.I. first contacted you in regard to this testimony?

A. Yes, it would. I went up North in October. That does help me. We will say October. [687]

Q. Just before you went up north?

A. That's right.

Q. It would be after the time of the arrest?

A. I beg your pardon.

Q. They first contacted you after the time of her arrest? A. Yes.

Q. So it wouldn't be July?

A. No; that's right.

Q. It would be sometime afterward?

A. Yes, sir.

Q. When they first contacted you did they ask you about the amount of meat and so forth that she bought? A. No, sir.

Q. Did they ask you if you had ever seen her?

A. They asked me if I could identify her picture?

Q. And you said she had been in quite a number of times?

A. As a customer, yes, sir.

Q. Is that just about all they asked you about?

A. At that time, yes, sir.

(Testimony of Harry L. Sotzien.)

Q. When is the first time they asked you the amount of meat and so forth that she bought?

A. Well, I'll say six weeks ago.

Q. Six weeks ago. That is the very first time?

A. That is the first time.

Q. They asked you if you had any records there in the store? [688]

A. No, I have no records on those things.

Q. Did they ask you if you had any records?

A. No, they did not.

Q. Did they say to you "Can you tell us whether she bought large orders or small orders?"

A. Not—no, they didn't.

Q. What did they ask you about the orders that she bought from you?

A. Well, I think I told them, well, that she was a good customer and bought a lot of meat from me.

Q. Anything else that they asked you that they wanted from you? A. No.

Q. Did they come there to ask you about it or were you the first one to tell them?

A. I volunteered.

Q. When they came to you they didn't ask you about how much she was buying?

A. No; that's right.

Q. Did they ask you about the quality of the meat? A. No.

Q. What was steak selling for in July, June and August?

A. Well, we were getting one-fifty—one-thirty

(Testimony of Harry L. Sotzien.)

to one dollar and fifty cents a pound on particular cuts.

Q. So that two or three steaks plus any other little purchases might come to four dollars? [689]

A. That's right.

Q. It might be just a meal for a couple of people, isn't that right? A. That's right.

Q. Did your shop sell things besides meat, sir?

A. In the meat department, in my department?

Q. In the meat department.

A. That is the only one I am interested in.

Q. You have a concession; that is your business there, is it?

A. I am in charge of anything that is put in the cooler, and when a customer calls for it, I gave it to them.

Q. Just a question or two about the sour cream. You don't keep that ordinarily in stock?

A. No, sir.

Q. Where do you get it from?

A. This particular came through Golden State.

Q. Some creamery that services your store?

A. Ordered especially.

Q. Do you have any record of how much sour cream you bought?

A. No, the groceryman would have to give you that; I didn't do the buying.

Q. All you did, whenever there was any call for it, you went into the box and got it?

A. Yes, it was put back in my cooler.

(Testimony of Harry L. Sotzien.)

Q. You don't know how much or how little sour cream Mrs. Kremen [690] bought?

A. No, I don't.

Mr. Gladstein: That is all.

Redirect Examination

Mr. Foster: Q. Mr. Sotzien, during the period in question how many New York steaks would $15.00 buy?

Mr. Gladstein: I am going to object to that as calling for an opinion and conclusion.

Mr. Foster: If Your Honor please——

The Court: It calls for a little mathematics.

Mr. Foster: Mr. Gladstein asked him how much $4.00 would buy. I have a right to ask him how much $15.00 would buy.

Mr. Gladstein: I will withdraw the objection.

The Court: Everybody can answer that.

The Witness: Shall I answer the question?

Mr. Foster: Q. Yes.

A. Well, you will figure a dollar or a dollar and a quarter a steak, New York steak of very good thickness.

Q. So that would be, if my mathematics are right, around nine steaks, wouldn't it?

A. It could be, yes; different sizes would naturally be different amounts.

Mr. Foster: That is all. [691]

Recross Examination

Mr. Gladstein: Q. You didn't sell her just steaks? A. Oh, no.

(Testimony of Harry L. Sotzien.)

Q. You might sell her a roast or a ham or something like that, just like you would to any customer? A. That's right.

Q. These orders during the time that you waited on her that would amount of $15, you don't say that they were all steaks, do you?

A. No, sir.

Q. By the way, in that area, Twain Harte, that is a vacation resort center, isn't it?

A. Yes, sir.

Q. A lot of people come up just for the summer months and you have a good number of them who are customers of yours during the summer?

A. That is right.

Q. And they buy pretty heavy on steaks, roasts and things of that kind, don't they?

A. That's right.

Mr. Gladstein: That is all.

Mr. Foster: No questions.

The Court: That is all, you may step down.

(Witness excused.) [692]

PHILLIP J. MOODY

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you state your name to the Court and to the jury?

A. Phillip J. Moody.

Direct Examination

Mr. Schnacke: Q. Mr. Moody, calling your attention to August of last year, August of 1953, where were you employed at that time?

A. Well, I owned a Shell Service Station in Santa Cruz, California.

Q. And where in Santa Cruz was that located?

A. Front and Soquel Avenue.

Q. And the second avenue?

A. Soquel.

Q. S-o-q-u-e-l? A. Yes, sir.

Q. And you say a Shell Service Station?

A. Yes.

Q. That is an automobile service station selling gasoline and oil?

A. Gasoline and oil and lubrication. [693]

Q. Now, sir, I will show you the last page on Government's Exhibit No. 88, which is a receipt and guarantee for C. V. Beaupre and N. F. Little, Shell Service, Soquel and Front, Santa Cruz, and ask if you recognize that document?

A. Yes I do.

Q. And what is that, sir?

(Testimony of Phillip J. Moody.)

A. That is a lubrication chart.

Q. And there is some handwriting on that. Do you know whose handwriting that is?

A. That is mine.

Q. That is your handwriting. Now, sir, do you recall the automobile that you serviced and whose servicing is represented by that sheet?

A. Yes, sir.

Q. I notice the sheet says that it is a Ford. Do you recall anything more about that than that?

A. Yes, a '50 Ford, tudor. It was a '50 Ford tudor coupe, five-passenger coupe.

Q. Do you remember the color of it by any chance? A. Metallic brown.

Q. And do you recall who brought the car on the occasion of this service?

A. Well, she was a young woman.

Q. Do you recall at all what she looked like?

A. Yes, I do. [694]

Q. How would you describe her?

A. She had black hair, about 23 years old, dark-complected.

Q. And can you tell by referring to the sheet that is in your handwriting the date on which she brought the car in?

A. The 16th of August.

Q. Of 1953, is that right? A. Yes, sir.

Q. Now I will call your attention to this table here and ask you if you see there the young lady that brought in the automobile?

(Testimony of Phillip J. Moody.)

A. The lady with the red jacket, I guess I guess that is a red jacket.

Q. The lady in red, in any event?

A. Yes.

Mr. Schnacke: Identifying the defendant Shirley Kremen.

Mr. Schnacke: Q. Was anyone with her on that occasion? A. No, sir.

Mr. Schnacke: That is all, sir. Thank you.

Mr. Gladstein: I move it all be stricken as incompetent, irrelevant and immaterial, if your Honor please.

The Court: It is hard for me to tell from the posture of the case what particular point was involved.

Mr. Schnacke: Well, if your Honor please, an automobile similar to the one described was found at the cabin; the receipt was found at the cabin and they are now tied together [695] to the defendant Shirley Kremen.

Mr. Gladstein: The receipt, I think, was found in the automobile; am I right about that, your Honor?

The Court: These policies were found in the desk; am I right about that?

Mr. Schnacke: They were found in the drawer of the desk in the living room: yes, your Honor.

The Court: I will overrule the objection—deny the motion.

Cross-Examination

Mr. Gladstein: Q. I just have a question or two,

(Testimony of Phillip J. Moody.)

Mr. Moody. Is there something on here that tells you what model that car was? A. No.

Q. Is there something on here in your records that tells you what color the car was?

A. No.

Q. Is there something on here that tells you whether the party for whom you did the job that came in with the car was a man or a woman?

A. No.

Q. Or how many people were in the car?

A. No.

Q. When were you first contacted about this?

A. Oh, I would say it was about 9—you mean when she brought the car in?

Q. I'm sorry; you are quite right. I didn't ask my question clearly. What I am trying to find out from you is, when was it that somebody from the F.B.I. or the prosecution first saw you about this receipt?

A. Oh, I would say maybe it was a week or two after this occurred.

Q. After what occurred?

A. After she came into the station.

Q. A week or two, is that right?

A. That is right.

Q. Which was it, now?

A. I just don't remember.

Q. The date that she actually brought it there would be right here, wouldn't it?

A. That's right.

Q. And it is on here, isn't it? A. Yes.

(Testimony of Phillip J. Moody.)

Q. And it shows it was the 16th of August, doesn't it? A. That's right.

Q. Do *you* considerable business at that station?

A. I did, yes.

Q. I beg your pardon? A. I did. [697]

Q. When they first asked you about this particular job, was there something about it that stuck in your mind? A. Yes, there was.

Q. And also what the color of the car was; you remembered that right off?

A. That's right.

Q. Were you paid for the job?

A. Yes, I was.

Mr. Gladstein: That is all.

Mr. Schnacke: That is all, sir. Thank you.

Mr. Darden: If your Honor please, at this time I would like to offer in evidence only against the defendant Patricia Blau at this time, Government's Exhibit No. 116 that was identified by Mr. Prelsnik and by Miss Collins.

Mr. Gladstein: I am going to object to that, if your Honor please, upon the ground that they are, as far as the record goes, the fruits of an illegal search and seizure and I move to suppress them, and also because they are not competent, relevant or material, do not prove anything in the case, not probative of any issue.

The Court: You are not offering them for any contents on the paper?

Mr. Schnacke: No, your Honor, for the condition——

The Court: Merely as the papers that the witness testified to that were recovered from the defendant in the [698] police station?

Mr. Schnacke: Yes, Your Honor.

Mr. Leonard: Well, if Your Honor please, if they are not offered for their contents they are doubly immaterial, just some blank paper——

Mr. Schnacke: They are papers taken from the defendant.

The Court: Only as the identification of the particular scraps of paper; that they were scraps of paper taken from the defendant?

Mr. Schnacke: Yes, Your Honor, and I think it is indicative of a consciousness of guilt.

The Court: If they are offered in evidence, the jury would have the right to see them.

Mr. Leonard: I am going to object to that statement of Mr. Schnacke as this being evidence of a consciousness of guilt and move that it be stricken and assign it as misconduct.

The Court: I see no way by which we can admit this evidence without the jury having the right, as the Court has, to inspect it, and even though we say that there is some writing, some scattered writing here, that may not be taken into account by the jury. The only way that that could be protected against would be to cover it up, and I don't particularly see the purpose of the offer. I will sustain the objection. [699]

ROBERT DARDEN

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury. A. Robert Darden.

Q. Please spell your last name.

A. D-a-r-d-e-n.

Direct Examination

Mr. Schnacke: Q. Mr. Darden, where do you reside? A. Denver, Colorado.

Q. And what is your occupation?

A. I am supervisor there at Montgomery Ward & Company.

Q. Montgomery Ward in Denver?

A. In Denver.

Q. For how long have you been so employed?

A. Oh, a matter of 24 or 25 years.

Q. Were you employed in the capacity of supervisor during the period of February, 1951 to March of 1951? A. Yes, sir.

Q. Now, sir, I will call your attention to the table at my left and ask if you recognize anyone at that table? If you care to stand up and approach the table you may feel free to do it. [700]

A. Yes, the girl in blue with the glasses, the blue collar—with the blue dress sitting at the end of the table. She is now writing.

Mr. Schnacke: And keeping her head down: The Defendant Patricia Blau.

(Testimony of Robert Darden.)

Mr. Schnacke: Q. And under what name—

A. Patricia Blair, as I knew her.

Q. Patricia——

Mr. Gladstein: I am going to object to that and move that it be stricken. I am going to object to further testimony as to back in 1951 upon the ground that it is remote, not within the issues of the case, not probative of any issue, and not within the fair purport of the indictment.

The Court: When was this, 1951?

Mr. Schnacke: 1951, yes.

The Court: He is identifying her as a person he knew at that time?

Mr. Schnacke: Yes, Your Honor.

The Court: Overruled.

Mr. Schnacke: Q. You say you knew her as Patricia Blair? A. Yes, sir.

Q. And where did you know her?

A. At the Montgomery Ward store.

Mr. Leonard: Your Honor, may I make the objection that Mr. Gladstein made, and also add to it that this is precisely [701] what information we sought to obtain on our motion for a bill of particulars and it was denied to us and we are not prepared to meet any evidence as to residence in Denver in 1951. This is not mentioned in the indictment on which we are at trial.

The Court: Of course the Court will not restrict evidence. There is no offense charged here in 1951. This may be preliminary; I don't know what the witness is going to testify, Mr. Leonard. The Gov-

(Testimony of Robert Darden.)

ernment attorney cannot put in all the evidence in one instant of time. I will overrule the objection.

Mr. Schnacke: Q. And where did you know her?

A. I knew her at Montgomery Ward at the time she worked there.

Q. She was employed by Montgomery Ward?

A. She was; she worked in my department.

Q. Do you have her employment record, sir?

A. I do.

Q. Do you have the employment application?

A. Yes, sir.

Q. And that is the employment application that the young lady gave to you prior to her employment?

Mr. Gladstein: I am going also to object to this and any further testimony, and I will ask Your Honor to examine the document that the witness has in his hands, and I should like to present a legal argument, if Your Honor please, with regard to this testimony. [702]

The Court: The witness was asked as to whether or not he had some application for employment, I take it?

The Witness: That is right, sir.

Mr. Schnacke: I will not ask any further questions with respect to that application then, if Your Honor please.

Mr. Schnacke: Q. Mr. Darden, during what period of time did Patricia Blair work for Montgomery Ward?

(Testimony of Robert Darden.)

A. She was hired on February 6, 1951 and released on March 27th, the same year, 1951; about six or seven weeks.

Mr. Schnacke: That is all, Mr. Darden.

Mr. Gladstein: I move that all this testimony be stricken and I cite the effort to produce this testimony as prejudicial on the part of the prosecution and for the sole purpose of trying to inject the idea of another name, to wit Patricia Blair. I submit it is outside the issues of the case and I assign it as misconduct and prejudicial.

Mr. Schnacke: If Your Honor please, the question of names has a very material bearing upon this case. We have two names already, and I think we are entitled to establish other occasions and other circumstances, and this is one of the witnesses who will establish that.

The Court: I think this is too remote. I will sustain the objection of the defense, having in mind now what the purpose was. The jury will disregard the testimony.

Is there anything else you want of the witness?

Mr. Schnacke: No, nothing further. Thank you, sir.

The Court: That is all.

(Witness excused.)

Mr. Schnacke: I understand that the matter was stricken not on the grounds of remoteness, but on the purpose of the offer; is that correct, Your Honor?

The Court: Well, on both grounds. The testi-

mony is stricken on the ground that the Court stated: That it is too remote——

Mr. Schnacke: Do I understand that if it had been offered as to 1953——

The Court: You have already put in evidence of events that occurred at about the time charged in the indictment with respect to names, and I am simply holding——

Mr. Schnacke: If Your Honor please, there is no time charged in the indictment as to the conspiracy.

The Court: I still hold that it is too remote.

Mr. Schnacke: I was concerned not with this witness but with another witness. I will *not* call the witness at this time.

Mr. Rouse.

D. E. ROUSE

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but [704] the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury. A. D. E. Rouse.

Q. Please spell your last name.

A. R-o-u-s-e.

Direct Examination

Mr. Schnacke: Q. Mr. Rouse, where do you reside? A. San Jose.

Q. And what is your occupation, sir?

A. Insurance adjustor.

Q. And by whom are you employed?

(Testimony of D. E. Rouse.)

A. General Adjustment Bureau.

Q. In San Jose?

A. In San Jose, yes.

Q. And where is the General Adjustment Bureau located? A. In San Jose?

Q. Yes. A. 491 Almaden.

Q. Now, sir, calling your attention to the table at my left, do you identify anyone there with whom you are acquainted or who is familiar to you?

A. I do.

Q. And is it a man or a woman? [705]

A. A woman.

Q. And which of the ladies is it?

A. The one sitting at the end of the table.

Mr. Schnacke: Identifying the defendant Patricia Blau.

Mr. Schnacke: Q. Where did you know her, sir? A. She was employed in the office.

Q. And under what name was she employed?

A. Janet Conroy.

Q. Janet Conroy. How long was she employed there, sir? A. Approximately six weeks.

Q. Six weeks. During about what period of time?

A. The latter half of July and in August.

Q. And her employment terminated in August, that is of last year, is that right?

A. Yes, that is correct.

Q. Now, sir, will you tell me what the telephone number is of the General Adjustment Bureau office at which Miss Conroy was employed?

(Testimony of D. E. Rouse.)

A. CYpress 3-4588.

Q. CYpress 3-4588? A. That is right.

Mr. Schnacke: That is all, sir. Thank you.

Cross Examination

Mr. Gladstein: Q. Mr. Rouse, were you an insurance [706] adjustor there?

A. Yes, sir, branch manager of the office.

Q. Branch manager. And Miss Conroy came to work sometime in July?

A. Yes, that is right.

Q. What kind of work did she do there?

A. Stenographic work.

Q. She was employed as a stenographer?

A. Yes.

Q. Did she remain in your employment until the 27th day of August?

A. I don't know the exact date. Our records would show that.

Q. You do have the work records?

A. Oh, yes.

Q. What do those records show?

A. The date of employment and the information given by the applicant, the time she was employed, and the date of termination.

Q. Do you have time records that you keep the period of a person's employment?

A. You mean daily or weekly records?

Q. Yes.

A. Yes, we should have time cards.

Q. So that your records would show that on the

(Testimony of D. E. Rouse.)

day when she first came to work for you in July of last year until some date [707] in August just what weeks and what days of those weeks she worked for you?

A. Some days on the daily or the weekly sheet if the girl happened to be absent, they sometimes fill the sheet in for the week; it is just a common practice in the office.

Q. Are absences noted?

A. Not necessarily, no.

Q. But you do have some noted?

A. Well, I don't believe that I have noted any in the past in about eight or nine months that I have been there.

Q. Now in the case of Miss Conroy did she work steadily for you? A. Yes.

Q. From the time that she first started to work until the time that she no longer came there?

A. To the best of my knowledge she was there at all times.

Q. And what were her days of work?

A. Mondays through Fridays, and she probably worked one, two or three Saturday mornings during that time.

Q. Do you know whether she also worked overtime on occasions? A. Yes, she did.

Q. What were the hours Monday through Friday that she worked there while she was employed at your firm? A. 8:30 until 5:00.

Q. With an hour or so off for lunch? [708]

A. Yes.

(Testimony of D. E. Rouse.)

Q. Now it has been fixed in this case, sir, that the day she was placed under arrest was the evening or night of August 27, 1953, which is a Tuesday. Now having that——

Thursday; I am sorry; Thursday. Having that in mind can you tell me whether it is a fact that from the time that she first went to work for you in July until that day, Thursday, August 27th, she worked steadily and continuously for you?

A. She was continuously employed, yes.

Q. By the way, during the time she was there did her appearance at all times resemble her present appearance? A. Yes.

Q. Did you ever see her with blond hair?

A. No.

Q. Mr. Rouse, when you were first contacted by a representative of the prosecution and of the F.B.I. did they ask you to check your time records concerning her employment? A. No.

Q. They didn't? They did ask you how long she had been employed, and so forth? A. Yes.

Q. And you told them? A. Yes.

Q. Did you tell them that she worked there steadily?

A. I don't believe the question ever came up, to my knowledge. [709]

Mr. Gladstein: One moment, Your Honor.

Mr. Gladstein: Q. This telephone number, CYpress 3-4588, what number is that?

A. That is correct.

Q. That is the number of the——

(Testimony of D. E. Rouse.)

A. That is the number of the General Adjustment Bureau in San Jose.

Q. That number is in the telephone book, isn't it? A. Certainly.

Q. And anybody wanting to call the General Adjustment Bureau just has to pick up a San Jose telephone book? A. Right.

Q. I will ask you this further question: Would it be possible to check your records from August 15th on through August 27th and ascertain whether Miss Conroy was away from work on any of those week days?

A. I presume the records are still available; I don't know that for sure.

Q. Would you be good enough to check them and I can communicate with you over the telephone when you go back to your job in San Jose?

A. They wouldn't be available in our San Jose office. They will be either, if available, in the San Francisco departmental office or in New York.

Q. Would you be good enough to inquire about it and I will [710] communicate with you about it sometime later in the week?

A. All right, sir.

Q. You are stationed at San Jose?

A. Yes, sir.

Mr. Gladstein: That is all, sir.

Mr. Schnacke: That is all, sir. Thank you.

The Court: We will take the luncheon recess now, members of the jury, and reassemble at 2:00 o'clock.

(Whereupon the noon recess was taken to the hour of 2:00 o'clock p.m. this date.) [711]

LUCILLE MEREDITH

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and to the jury?

A. Lucille Meredith.

Direct Examination

Mr. Schnacke: Q. Miss Meredith, in what town do you live? A. San Jose.

Q. And in 1953, during the middle of the year, would you tell us what your address was?

A. 69 North 10th Street.

Q. In San Jose? A. Yes.

Q. Was there a telephone at that address?

A. Yes.

Q. And in whose name was that telephone listed? A. It was in my name.

Q. In your name? And you had it installed, did you? A. Yes.

Q. What type of house was that? [712]

A. It was a two-story rooming house.

Q. A rooming house? A. Yes.

Q. And you were one of the tenants?

A. Yes.

Q. Now, would you glance at the table to my

(Testimony of Lucille Meredith.)

left and tell me if any of the persons at that table was also a tenant? A. Just one.

Q. Which one is that?

A. The one on the end.

Mr. Schnacke: Identifying the defendant Blau.

Mr. Schnacke: Q. And were you acquainted with that young lady?

A. Well, just as I was with the rest of the roomers.

Q. And under what name did you know her?

A. Janet Conroy.

Q. When you installed the telephone there, was it for the use of all the tenants?

A. For four of us.

Q. How did you limit it to four?

A. Well, we had the telephone locked.

Q. You had a lock on the phone? A. Yes.

Q. And you had a key, did you?

A. Yes. [713]

Q. And the other three had keys, likewise?

A. Yes.

Q. Did Miss Conroy have a key?

A. Yes.

Q. She was one of the four? A. Yes.

Q. What was that telephone number, Miss Meredith? A. CYpress 7-0394.

Q. CYpress 7-0394? A. Yes.

Mr. Schnacke: That is all, Miss Meredith, thank you.

Cross Examination

Mr. Gladstein: Q. Just a question or two, Miss

(Testimony of Lucille Meredith.)

Meredith: This was a rooming house that you lived in? A. Yes.

Q. Where was the phone located?

A. In the hallway.

Q. What was this about a key?

A. Well, we had a padlock on the telephone so those that weren't helping on the payment of the phone couldn't use it.

Q. So the people who were helping pay the bill had keys to it? A. Yes.

Q. And Mrs. Conroy and yourself and others who were paying the [714] phone bill had keys to it? A. Yes.

Q. And it was a phone that was for the common and joint use of all the people there?

A. Yes.

Mr. Gladstein: Thank you.

Mr. Schnacke: No further questions.

(Witness excused.)

Mr. Schnacke: Mr. Price.

ANDREW M. PRICE

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and to the jury?

A. Andrew M. Price.

Direct Examination

Mr. Schnacke: Q. Mr. Price, by whom are you employed? A. Poulton & Orr.

Q. And in what business are they?

A. Insurance brokers.

Q. Where are they located?

A. In Oakland. [715]

Q. What is the address?

A. 4001 Webster Street.

Q. Were they in that business at that location in May and June of 1953? A. They were.

Q. And were you employed by them at that time? A. I was.

Q. And what was the nature of your employment? A. I am the office manager.

Q. And you were at that time?

A. I was at that time.

Q. Would you look at the table to my left and tell me if you recognize anyone at that table?

A. Yes, I do.

Q. Whom do you recognize?

A. Betty Miller.

Q. And whom do you identify as Betty Miller?

(Testimony of Andrew M. Price.)

A. The one at the far end of the table.

Q. In the blue dress?

A. That's correct, with the white.

Mr. Schnacke: Identifying the defendant Patricia Blau.

Mr. Schnacke: Q. You referred to her as "Betty Miller." Is that the name under which she was employed? A. Yes.

Q. And during what period was she employed by your company? [716]

A. From the middle of May until the end of June, 1953.

Q. Of what year? A. 1953.

Mr. Schnacke: No further questions.

Cross Examination

Mr. Gladstein: Q. Mr. Price, what kind of work was she engaged in for you?

A. For the firm she was employed as a dictaphone transcriber, a typist.

Q. For how long was she employed?

A. About six weeks.

Q. How long did she employ her for?

A. We employed her hoping it would be a permanent relationship.

Q. She left the job?

A. She left the job, yes.

Q. You were quite satisfied with her services?

A. Yes.

Q. Did she tell you before she left or at the

(Testimony of Andrew M. Price.)

time she was leaving that she wanted to get another job in San Jose?

A. No, she did not.

Q. Did you know she was going to San Jose?

A. No, sir.

Q. Didn't she tell you that?

A. No, she did not. [717]

Q. She told you she was quitting?

A. Yes.

Q. And she told you she was quitting to take work elsewhere?

A. No. She told us she was quitting because while she was there we received delivery on a new type of typewriter, and we asked her if she could develop skill and proficiency on this machine, and she attempted it, and in fact she came in extra time to work on it, and she wrote us a note of resignation saying it was too much for her, she hadn't bargained on having to acquire this additional skill, and that was the reason she gave for her termination. She said she didn't request instant relief, but she asked that at the end—as soon as she could be replaced, she would stay on until that time.

Q. What kind of typewriter was it she worked on at first?

A. I don't know the make, but it would be called a standard typewriter.

(Testimony of Andrew M. Price.)

Q. And what kind of typewriter was this new machine.

A. It was an electric typewriter of the executive type, which has certain characteristics which are not—requires considerable practice to master.

Q. It does require considerable practice?

A. Yes. The spacing is different. The touch is considerably different.

Q. And she tried to achieve some skill in that, you say? [718] A. That is correct.

Q. And then told you she wasn't able to do so?

A. Yes.

Q. Did she come to you from another job?

A. We got her through an employment agency in Oakland. She gave as a former employment other—she listed several former employers.

Q. I say, did she come to you from some other job or an employment agency?

A. An employment agency.

Q. In other words, you had an ad of some kind or a request with an employment agency for help?

A. That is correct.

Q. And in due course of business she appeared at your place in response to that ad?

A. That is correct.

Q. You tried her out and found she was satisfactory? A. That is right.

Q. Until this change of typewriter?

A. M-hm.

Mr. Gladstein: I move to strike out all the testimony of the witness, if Your Honor please, upon

(Testimony of Andrew M. Price.)

the ground it is incompetent, irrelevant and immaterial to any issue in this case. It was offered for prejudicial purposes.

The Court: I will deny it. [719]

Mr. Gladstein: I have no further questions.

Mr. Schnacke: That is all.

(Witness excused.)

Mr. Schnacke: Mr. Olsen.

WALTER J. OLSEN

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and to the jury?

A. Olsen. Walter J. Olsen.

Direct Examination

Mr. Schnacke: Q. Mr. Olsen, where do you reside? A. San Jose.

Q. And are you employed in San Jose?

A. Yes, sir.

Q. By whom? A. San Jose Ford Sales.

Q. What is the nature of the business of that company? A. It is a Ford Agency.

Q. New cars and used cars?

A. New cars and used cars.

Q. How long have you been so employed? [720]

A. Four and one-half years.

(Testimony of Walter J. Olsen.)

Q. Were you employed there, then, in August of 1953? A. Yes.

Q. In connection with your employment—. What is the nature of your employment?

A. I am a salesman.

Q. A salesman? Now, sir, I will show you Government's Exhibit 9, which appear to be documents bearing the name San Jose Ford Sales Company, and ask you if you recognize either of those documents? A. Yes, I do.

Q. Do you recall the transaction that the documents reflect?

A. This one document reflects the sale of a used car to Janet Conroy.

Q. And to which of the documents do you refer?

A. The order.

Q. The order? And to what does the other document refer?

A. That is a receipt for a down payment.

The Court: What is the exhibit number?

Mr. Schnacke: No. 9. Government's Exhibit 9.

Mr. Schnacke: Q. Do you know in whose handwriting those documents are prepared?

A. The order is written in my handwriting.

Q. And do you recognize the hand on the other?

A. I do not recognize that. It is one of the girls in the [721] office.

Q. Now, sir, I will call your attention to the defendants' table and ask you if you recognize at that table anyone with whom you had the transaction reflected on that paper? A. I do.

(Testimony of Walter J. Olsen.)

Q. And who there did you have the transaction with? A. Miss Conroy, at the far end.

Mr. Schnacke: Identifying the defendant Patricia Blau.

Mr. Schnacke: Q. Can you tell us when this transaction occurred? A. On August 6th.

Q. And what occurred on that day?

A. Well, on August 5th I was—I received a telephone call stating that a party in the Insurance Adjustment office was interested in a car, used car, and this call came from a friend of mine, and I contacted the party and asked about the type of car she wished to purchase.

Q. You contacted what party?

A. Miss Conroy. I also contacted the party that called me, too. At the present time we didn't have a car similar to the one which she desired in the store, and one came in the following day or the day after, and I took it to her office and showed it to her.

Q. Who was present when you showed her the car?

A. She brought her employer and another employee down to [722] look at the car from the office.

Q. And did she try the car out? Did she drive it?

A. No, she didn't drive it. She rode with me while I drove it and demonstrated the car to her.

Q. She did not drive the car?

A. She did not drive the car.

Q. Did you sell the car to her on that occasion?

(Testimony of Walter J. Olsen:)

A. That is the day I sold her a car, yes.

Q. And that day would be, you said, August——? A. August 6th.

Q. August 6th. Did you deliver the car to her?

A. No, the car needed some minor repairs and had to be cleaned and polished, and it was the following evening when I delivered the car to her place of employment and left it at the rear of a building where she worked.

Q. Was that pursuant to her instructions?

A. That is right.

Q. Did you leave the keys in the car?

A. No, I delivered the keys to her office. She wasn't in the office at the time and I left them in her office with a note.

Q. What was the total price of that car?

A. With tax and license transfer it was $1,165.38.

Q. And how was the payment made?

A. There was a $200 deposit made at the time of the transaction and the following day Miss Conroy paid the balance. [723]

Q. Do you recall whether it was paid by cash or check?

A. It was a cash transaction. I think it was cash.

Q. Was there any car turned in on the deal?

A. No, there was no trade-in.

Q. Do you recall having any conversation with Miss Conroy concerning her need for an automobile?

(Testimony of Walter J. Olsen.)

A. Yes. At the time of the sale she stated that she was just learning how to drive, and the primary purpose for purchasing a car was to be able to give her mother rides in the car. She thought that they would like—her mother would like to enjoy the use of a car, and that was the reason for the purchase.

Q. Did you see Miss Conroy thereafter, or the automobile?

A. No, I never saw Miss Conroy after that time.

Mr. Schnacke: That is all, sir, thank you.

Cross Examination

Mr. Gladstein: Q. Mr. Olsen, would you remain a moment, please? A. Yes, sir.

Q. You heard from somebody in an insurance company there was somebody interested in buying a car? A. That is right.

Q. Who did you hear that from?

A. Bob McDonald, I think. One of our customers. I know his [724] name is Bob.

Q. Some friend or acquaintance or customer of yours? A. That's right.

Q. Who is employed in an insurance company?

A. It is an insurance adjusting office.

Q. The first you heard was that he said that he had heard there was somebody there might be interested in a car? A. Yes.

Q. And you took it upon yourself, as a salesman, to try to sell it? A. Yes.

Q. And you contacted Mrs. Conroy?

(Testimony of Walter J. Olsen.)

A. That is right.

Q. And showed her a car you had for sale that was a Ford, is that right?

A. That is right.

Q. And you displayed it for her, demonstrated it for her? A. I did.

Q. And she paid you for it?

A. That is right.

Q. You were not defrauded or cheated in anyway, were you? A. None whatsoever.

Mr. Gladstein: That is all.

Mr. Schnacke: That is all, sir, thank you.

(Witness excused.) [725]

Mr. Schnacke: Mr. Citron.

NATHAN J. CITRON

called as a witness for the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and to the jury.

A. Nathan J. Citron.

Direct Examination

Mr. Schnacke: Q. Mr. Citron, where do you reside? A. San Jose.

Q. And what is your business?

A. Insurance.

Q. And where is your office?

A. 123 So. 3rd Street.

Q. In San Jose? A. In San Jose.

(Testimony of Nathan J. Citron.)

Q. What is the nature of your insurance business? Are you a broker?

A. Insurance agent for all lines.

Q. For what companies are you an agent?

A. Oh, various companies.

Q. For a number of companies? [726]

A. For a number of companies, yes.

Q. Now, sir, I will show you the first document that comprises Government's Exhibit 88, which appears to be an insurance policy on the Indiana Lumberman's Mutual Insurance Company, and ask you if you have ever seen that document before?

A. Yes, sir, I have.

Q. Is that an insurance policy that you sold?

A. That is one of my policies and signed by my name.

Q. Signed by you?

Mr. Gladstein: I move that be stricken as not responsive to the question. The question was whether he sold it, if Your Honor please.

The Court: Read the question and answer.

(Question and answer read by the reporter.)

Mr. Schnacke: Q. Did you sell that policy, sir?

A. Yes, sir.

Q. And it is one of your policies and signed by you? A. Yes, sir.

Q. Do you recall the circumstances of the sale of that policy?

A. Yes, I do. Mr. Rouse called me and asked me if I wanted to sell a policy. I said I would be very happy to, and he told me he had a young lady

(Testimony of Nathan J. Citron.)

in his office that was interested—just bought a car and need liability insurance, and he gave me her name and he said he would transfer the call over to her so she could give me the information I needed to take the order [727] for her.

Q. And was the call transferred?

A. Yes, sir.

Q. And did you speak to a lady?

A. I spoke to a lady who gave me the name of Janet Conroy.

Q. And she gave you the information included in that policy? A. Yes, sir.

Q. And you wrote up the policy, is that correct?

A. Yes, sir.

Q. Did you ask her in connection with that policy—or did you have any conversation with her concerning the use to which the car was to be put or the persons who were to drive the car?

A. Well, we always ask if there are any other drivers.

Mr. Gladstein: I move that be stricken, if Your Honor please.

The Court: Yes. The question is whether you asked her.

Mr. Schnacke: Q. Whether you did ask, and not what you always do. A. Yes, I did.

Q. What you did on that specific occasion.

A. I did, yes.

Q. What did you ask her?

A. Knowing she had taken it out for herself,

(Testimony of Nathan J. Citron.)

I asked her if there were other drivers using the car.

Q. What did she reply?

A. She said her mother would use the car at various times. [728]

Q. When was that policy obtained? Do you recall the date of that conversation?

A. Well, the date of my memo blank—memo order is August 7th.

Q. And what is the policy dated?

A. August 7th.

Q. Was that policy paid for?

A. Yes, sir, it was.

Q. At some later time?

A. Several days later, yes.

Q. What automobile does that policy cover?

A. This covers a 1950 Ford Club coupe.

Mr. Schnacke: That is all, sir.

Cross Examination

Mr. Gladstein: Q. You received the premium, or whatever you call it, for the policy?

A. Yes, I did.

Q. You were not cheated or defrauded in any way, were you? A. No, sir.

Mr. Gladstein: That is all.

(Witness excused.)

Mr. Schnacke: Mrs. Mecca. [729]

MAXINE MECCA

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. Maxine Mecca.

Q. Will you spell your last name?

A. M-e-c-c-a.

Direct Examination

Mr. Schnacke: Q. That is Mrs. Mecca, isn't it?

A. That is right.

Q. Where do you reside, Mrs. Mecca?

A. In Oakland.

Q. And by whom are you employed?

A. At what time?

Q. At the present time.

A. At present I am employed by the Sterling Transit Company.

Q. During the year 1951 by whom were you employed? A. Pacific Publishing Company.

Q. Pacific Publishing Company? A. Yes.

Q. And where are they located?

A. 590 Folsom Street, San Francisco. [730]

Q. Over what period of time were you employed by them?

A. I went to work there in April of 1950, I believe, and worked until May of 1952.

Q. April, 1950, until May, 1952?

A. Yes.

(Testimony of Maxine Mecca.)

Q. What is the business of the Pacific Publishing Company?

A. They are publishers of the People's World.

Q. That is a daily newspaper?

A. That is right.

Q. What was the nature of your work with the Pacific Publishing Company?

A. I worked in the mail room as a mailer.

Q. As a mailer? A. Yes.

Q. What in general does that work constitute?

A. Well, I distributed their papers as they come from the press room and saw that they were addressed and mailed to the subscribers.

Q. How were those papers addressed?

A. The names and addresses were on addressograph plates, and they were run on a list or tape and applied to a wrapper in which each paper was individually wrapped and mailed.

Q. What part of that work was under your supervision, or what part did you do?

A. Well, all of it. [731]

Q. How many people were employed in that department? A. Two of them.

Mr. Leonard: If your Honor please, that is objected to, and I think this whole line of inquiry is incompetent, irrelevant and immaterial.

Mr. Schnacke: I will withdraw the last question.

Mr. Schnacke: Q. Mrs. Mecca, I will show you two bundles of papers here and ask you if you know what those are.

(Testimony of Maxine Mecca.)

A. Yes, those are mailing lists of the People's World.

Q. Of the People's World. Can you examine those and tell me when you saw those documents for the first time?

A. Well, these are tapes that I ran off myself and the date is on here, May 7, 1951.

Q. One of them is May 7, 1951?

A. May 7th, and the other is November 9, 1951.

Q. Under what circumstances did you run those off, Mrs. Mecca?

A. Well, I ran them off of my own free will because—and offered them to the Federal Bureau of Investigation to do with as they saw fit.

Q. You delivered these to the Federal Bureau of Investigation, is that right?

A. Yes, I did.

Q. About when was that with respect to the date on each of them?

A. Well, just within a few days of the dates.

Q. You ran them off, and within a few days you delivered them? A. Yes.

Q. So that each were delivered on a separate occasion, is that right?

A. That is correct.

Q. Now, Mrs. Mecca, these appear to be a list of names with [733] certain symbols under them. I will call your attention to the names that I have marked with paper clips, and under them appears to be a symbol. Without reference to the name that

(Testimony of Maxine Mecca.)

is there mentioned, will you tell us what the symbol under there means?

Mr. Gladstein: Just a moment, Miss, please. I am going to object to this, if your Honor please, upon the ground that no proper foundation has been laid for this testimony; it is incompetent, irrelevant and immaterial. It appears, moreover, that these documents have been stolen, and therefore are not in the rightful possession either of the witness or anyone else, and hence testimony based upon them would be in violation of the constitutional provisions.

Mr. Schnacke: Do you charge they were stolen from any of these defendants?

The Court: Not necessarily that they were stolen. You might have some cause of action in a legal proceeding in which they were a party.

Mr. Gladstein: Perhaps I shouldn't have used that world. I apologize if the word sounds too strong. I understood the lady to say she definitely took them; I got the implication without the permission of her employer, and she turned them over to the FBI under circumstances which seemed to be in violation of her duties to her employer.

Mr. Schnacke: I think that she definitely has not violated [734] the rights of any of these defendants, and there is no charge——

The Court: What did you say?

Mr. Schnacke: There is no indication that she violated the rights of any of these defendants, and I think they are the only ones that would be in a

(Testimony of Maxine Mecca.)

position to complain if their rights had been violated.

Mr. Gladstein: I think the constitutional rights of a defendant are violated when the offer by the prosecution is of testimony that has been obtained in the manner that the witness has indicated. But more than that, if your Honor please, I wish to challenge the basis on which this testimony is being elicited.

The Court: Mr. Gladstein, I am not a Solomon, and I haven't the faintest idea of what this testimony is going to show. There has a roll of paper been handed to the witness and the witness has been asked to explain that roll of paper. How can I decide whether it challenges anybody's rights until I know what it is about? You may know more about it than I do.

Mr. Gladstein: No, I first have learned it when Mr. Schnacke handed that to me a moment ago. I do have that advantage over the Court, and I will invite the Court to examine the very same exhibit that counsel has shown to me.

The Court: What is it that you want to show, counsel; that one or more of the defendants are on the subscribers' list of the newspaper? [735]

Mr. Schnacke: Yes, your Honor, to establish knowledge as required by the indictment of the specific matters referred to.

Mr. Gladstein: That is just the point, and I wouldn't want to be held responsible for everything that appears in the Chronicle or the Examiner, to

(Testimony of Maxine Mecca.)

both of which I subscribe, because I do not always read everything in them, and sometimes when I read them, I am not sure I understand some of the things. I don't think because I happen to be a subscriber I can be held legally responsible for something that appears in that newspaper.

Mr. Schnacke: I think it goes to the weight rather than to the admissibility, your Honor.

The Court: Is that the whole purpose of this examination?

Mr. Schnacke: Yes, your Honor.

The Court: Is to show that one of the defendants is on the subscription list of this magazine?

Mr. Schnacke: Yes, your Honor.

Mr. Gladstein: May I suggest to the Court now that the purpose has been fully revealed to us by the prosecutor, that it does definitely invade the defendants' rights as guaranteed to them by the United States Constitution. I do not see how there can be any kind of criminality for somebody to subscribe to a newspaper. I want to press that additional point.

The Court: That is the sole basis of the evidence?

Mr. Schnacke: There will be other facts. [736]

The Court: That is what you want to show?

Mr. Schnacke: That is what I want to show.

The Court: Mr. Schnacke, I don't see, unless it were connected up in some way with the facts in the case, how that would be admissible.

Mr. Schnacke: There will be a further connec-

(Testimony of Maxine Mecca.)

tion by showing receipt of the papers and by showing specific newspapers containing matter specifically bearing on the subject that we are trying to develop.

Mr. Gladstein: They have to show that a particular defendant actually had knowledge of what was contained in some particular issue.

Mr. Schnacke: I think there is nothing novel about this approach, your Honor.

Mr. Gladstein: I think it is very novel. I was in Honolulu for nine months during which time the San Francisco Chronicle came to my home. I am not to be held responsible for what appeared in those papers which I never saw, and it seems to me that he has to bring home to the defendants that that which appeared in the paper was definitely within the knowledge of one or more of the defendants.

The Court: I would be inclined to think that is right. I don't see how there would be any legal basis for the admission of that sort of evidence unless it is brought home in some way.

Mr. Schnacke: If your Honor please, I was satisfied of [737] that, and I will of course abide by your Honor's ruling, that such a matter goes to the weight of the evidence rather than to the admissibility; but certainly the availability of the knowledge, the close contact with the subject matter that would give the knowledge is some evidence of the fact that the knowledge was obtained. Now, granted, it isn't conclusive, but nonetheless it is my feeling and the——

(Testimony of Maxine Mecca.)

The Court: Will you have these marked for identification and have the witness authenticate them in some way so that you will have a record here, and I will for the time being sustain the objection, unless you are in a position to present some other evidence that would warrant its introduction.

Mr. Schnacke: Very well, your Honor.

The Court: Have these marked for identification, the particular things that you want marked for identification.

Mr. Schnacke: May the photostats be marked for identification rather than the rolls?

Mr. Gladstein: I have no objection to that, your Honor.

The Court: All right; mark the photostats then for identification.

Mr. Gladstein: What are the numbers of them?

Mr. Schnacke: Wait until I found out which is which. I will ask that the first photostat be received and marked Government's Exhibit next in order as being an extract from the roll identified by the witness as dated November 9, 1951. [738]

The Clerk: That is Plaintiff's Exhibit No. 117 marked for identification.

(Whereupon photostat of extract from roll of November 9, 1951, referred to above, was marked Plaintiff's Exhibit No. 117 for identification.)

Mr. Schnacke: And the second photostat to be marked for identification with the next exhibit num-

(Testimony of Maxine Mecca.)

ber coming from the roll identified by the witness as dated April 15, 1951.

The Clerk: That is Plaintiff's Exhibit No. 118 marked for identification.

(Whereupon photostat of extract from roll of April 15, 1951, referred to above, was marked Plaintiff's Exhibit No. 117 for identification.)

The Court: Did you want this witness for anything else, Mr. Schnacke?

Mr. Schnacke: Might the symbols without the names be identified as to their meaning, or does your Honor desire me not to go further with that?

The Court: I don't quite understand you.

Mr. Schnacke: Under the names are certain symbols which I understand indicate something with reference to the——

The Court: You can have the witness explain what that means, as long as it is not further identified.

Mr. Schnacke: Yes.

Mr. Gladstein: I think, in fairness, Mr. Schnacke, you [739] should advise the Court that while you are showing these names to the witness, both of them as I understand it contains a name, one of the names is not the name of any defendant here. Am I right about that?

Mr. Schnacke: Both of them are names other than the names of the defendants herein: that is, the names as they appear here are not the names of any of the defendants as we know them.

(Testimony of Maxine Mecca.)

Mr. Gladstein: I see; the numbers under the names.

Mr. Schnacke: In one case it reads "N6-13-52-Y." Does that symbol have any meaning to you?

A. The "N" means it is a new subscription. "6-13-52" is the expiration, and the "Y" means it is a year's subscription.

Q. So that the other reading "N-1-5-52Y" means that that also was a new subscription expiring January 5, 1952, and the "Y" is a one-year subscription? A. That is correct.

Mr. Schnacke: If your Honor please, I will ask that these documents also be marked simply for identification to support the offer.

The Court: These are what? Photostatic copies of the magazine in question?

Mr. Schnacke: Yes, your Honor.

The Court: Do you want the witness to identify them as photostatic copies of certain issues?

Mr. Schnacke: Yes, as having been mailed.

Q. Now, Mrs. Mecca, can you identify these documents?

A. Yes. This is the daily Los Angeles issue of the paper.

Q. You say the Los Angeles issue. Are there different issues?

A. Yes, there is a southern L. A. edition and a north edition, and a once-a-week northwestern edition.

Q. Is that the issue which would have been sent to a southern California subscriber?

(Testimony of Maxine Mecca.)

A. Yes, the Los Angeles edition.

Q. Would those editions have been mailed on or about the dates that they bear?

A. Yes, on the date that is on there.

Mr. Schnacke: May we again ask that photostatic copies be substituted?

The Court: No objection.

Mr. Schnacke: I have one additional copy that I see got mixed up.

Q. Does that fall in the same category as the other documents that you identified?

A. Yes.

The Clerk: Plaintiff's Exhibit 119 marked for identification.

(Whereupon photostatic copies of People's World referred to above were marked Plaintiff's Exhibit No. 119 for identification.)

Mr. Schnacke: Nothing further. Thank you.

Cross-Examination

Mr. Gladstein: Q. Mrs. Mecca, I want to show you Plaintiff's Exhibit 118 for identification. Does that indicate to you that the person whose name is on there obtained that subscription in that name commencing January 5, 1951? A. Yes.

Q. And the fact that January 5, 1952 appears thereon indicates that the latter was the date of expiration of an annual subscription?

A. Yes.

(Testimony of Maxine Mecca.)

Q. When did you go to work for the Pacific Publishing Company?

A. In 1950 in—I'm not sure of the month, but I believe it was around April.

Q. And you worked there for about two years?

A. Yes.

Q. And your position was what?

A. A mailer.

Q. Were you an employee of the Pacific Publishing Company? A. Yes.

Q. Were there other mailers there?

A. Yes.

Q. How many?

A. Two regular, and then we had extra help on as it was needed.

Q. During the period of approximately two years that you were there did the circulation vary a great deal or was it fairly [742] constant?

A. Well, it—it, toward the end of the time I was employed it had decreased to some extent.

Q. What would you say was the approximate average of the mailings of each edition of the paper?

A. Of each edition? You mean each day?

Q. Each issue. Did it come out every day?

A. Yes.

Q. All right; each issue.

A. It has been so long ago——

Q. It has been what?

A. It has been some time ago since I have even thought about it.

(Testimony of Maxine Mecca.)

Q. You were there for two years, you say?

A. Yes.

Q. Was it a matter of a few hundred or a matter of some thousands?

A. No, it was thousands; oh, eight thousand to nine thousand.

Q. Eight to nine thousand?

A. The daily; and then on the weekend editions was more, around thirteen to fifteen thousand.

Q. Thirteen to fifteen thousand on the weekend edition? A. Yes.

Q. And the daily editions were eight or nine thousand? A. Yes. [743]

Q. These were the regular mailings day after day during the period you were there?

A. Yes.

Q. Of course, you personally didn't see to every mailing, that is, every issue? What was your task as to the mailing? What did you do?

A. Well, as the new subscriptions were sent down to the mailing room I made up the plates such as you saw there and ran the tapes.

Q. Yes?

A. And assisted in stamping the tape onto an individual wrapper.

Q. Yes?

A. And then the papers were wrapped——

Q. Yes?

A. And tied up in bundles—made up into bundles. I ordered the press runs from the press room.

Q. How did you go about stamping the name of

(Testimony of Maxine Mecca.)

the address onto the wrapper or whatever it was? Was there a machine?

A. Yes, there is a hand mailing machine and those rolls are put in it, and then a knife, cutter blade, and a little paste applied to the tape as the machine would cut them off one at a time.

Q. Did you have any particular plates or names of addressees assigned to you? [744]

A. No, no particular names.

Q. You don't have any recollection of the various plates or names on the plates to whom you had mailed out issues of the paper, do you?

A. You mean, I acquainted with each person that the paper went to?

Q. No, I say can you remember the names of persons to whom you sent copies of the paper?

A. You mean remember names on the mailing list?

Q. Yes. A. No.

Q. Was there a complaint department?

A. In the mailing room?

Q. Well, in the Pacific Publishing Company. By the way, what is at 590 *Fulton* Street? Is that a building of some kind? A. Yes.

Q. Did it house a press of some kind?

A. Yes.

Q. Was it identified in any manner? Did it have some name that was visible to people?

A. Not that I know of.

Q. What kind of a building was it?

A. It is a two-three-story building.

(Testimony of Maxine Mecca.)

Q. Where were the presses located?

A. In the basement. [745]

Q. Where was your office located?

A. On the next floor up.

Q. Was there some identification, billboard or something, in the lobby, if there was one, or outside door, to identify the office.

A. Not on the entrance that I used, no.

Q. Was there the legent Pacific Publishing Company anywhere?

A. Not that I recall.

Q. You don't recall that?

A. There may have been something on the front door.

Q. That is what I am asking you; was there anything on the front door?

A. I really don't recall.

Q. Didn't you use the front door?

A. No, I didn't use the front door.

Q. Was the place listed in the telephone book?

A. I really don't know; I didn't have occasion to look it up.

Q. Did the building have telephones in it?

A. Yes.

Q. By whom were you paid?

A. By the Pacific Publishing Company.

Q. Was it a newspaper of general circulation?

A. What do you mean by that?

Mr. Schnacke: I think that calls for a conclusion of this witness. [746]

Mr. Gladstein: Q. If you don't know, just don't

(Testimony of Maxine Mecca.)

answer the question. After you had finished addressing these wrappers, or whatever they were, did you do the actual mailing?

A. Part of it. There were other employees, too, that did it.

Q. What did you do? Just take them to the United States Post Office?

A. No; we had mail sacks there and they were sacked right there at the plant and then delivered to the post office.

Q. What kind of mail sacks? U.S. mail sacks?

A. U.S. mail sacks.

Q. These papers were put in the mail sacks and delivered to the post office?

A. That is correct.

Q. In May of 1951 you took one of these rolls, did you, or you made a copy of a roll, is that it?

A. Yes.

Q. You did that on the job, did you?

A. Yes.

Q. You didn't ask for permission or consent to do that, did you? A. No.

Q. It was your own idea or somebody else's idea? A. No, it was my idea.

Q. Nobody suggested it to you?

A. No. [747]

Q. When you did that did you have in mind to take it to the authorities? A. Yes.

Q. Did you think that something illegal was going on and you wanted to hand the names *over*?

Q. You didn't thing that. And in November 1951

(Testimony of Maxine Mecca.)

when you collected a group of names on this tape and decided to take this to the FBI did you think that the paper was doing something illegal?

A. No.

Q. You didn't tell anybody by whom you were employed at the Pacific Publishing Company that you were doing this, did you? A. No.

Q. Did you know that the United States Government was handed every day a complete list of all the subscribers whose names appear on the outside wrappers of those papers?

A. No, I didn't know that.

Mr. Gladstein: I have no further questions.

Mr. Schnacke: That is all. Thank you.

(Witness excused.)

Mr. Schnacke: If your Honor please, under the circumstances, may I make an offer with respect to the next witness, and not use any names.

The next witness will testify that she resided adjacent to the dwelling of one of the defendants here; that on an occasion [748] in the latter part of 1951 she had occasion to observe a copy of the People's World delivered at the wrong address in error; that very shortly after it was received, one of the defendants here appeared at her door and said, "Have you taken my paper by mistake?" And the paper was delivered to her. Now under the circumstances I thought I had better make that offer to you to determine whether or not your Honor feels that that is in any way material, and if it is not, I will not proceed with the witness.

The Court: What have you to say, counsel?

Mr. Gladstein: If the Court please, it isn't probative of anything.

The Court: I don't think that it adds anything, the fact that the paper was received. [749]

Mr. Schnacke: I think it shows more than a casual interest in the paper, if your Honor please; but of course we will be bound by your Honor's ruling.

The Court: I will sustain the objection.

Mr. Schnacke: Robert Munger.

ROBERT MUNGER

called as a witness on behalf of the government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. Robert Munger.

Q. Please spell your last name.

A. M-u-n-g-e-r.

Direct Examination

Mr. Schnacke: Q. Mr. Munger, I don't have to ask you your occupation, but what is your rank in the military service?

A. Private, sir.

Q. And where are you assigned?

A. Fort Ord.

Q. And what is the nature of your assignment? Are you in a company or some military designation of your assignment?

(Testimony of Robert Munger.)

A. Well, I am with the headquarters of the 6003 SU Detachment. [750] I am on duty in the public information office.

Q. At Fort Ord, California?

A. That is right.

Q. How long have you been in the Service?

A. Since November 16, 1953.

Q. Mr. Munger, I will ask you to examine the defense table to my left and tell me if you are acquainted with any of the persons sitting at that table?

A. Yes, sir; I am acquainted with one of the parties at the defense table.

Q. And which party is that?

A. Sir, due to the extreme gravity of this case, I wonder if it is all right with you if I go over for a closer examination?

Q. Yes, certainly.

A. (Witness left the witness stand and approached the defense counsels' table.) It wasn't that I wasn't sure; I just wanted to be doubly sure.

Q. And which of the defendants, if any, do you identify?

A. The young lady at the far end of the table, at the corner, with the red jacket on.

Mr. Schnacke: Identifying the defendant Shirley Kremen.

Mr. Schnacke: Q. And when and where did you know her, sir?

A. It was while I was in college at the Los An-

(Testimony of Robert Munger.)

geles City [751] College starting in—I was in college starting the fall of 1949.

Q. At the Los Angeles City College, did you say? A. That is right, sir.

Q. And how long were you there?

A. I was there for two years.

Q. You were there then from the fall of '49 then to the fall of 1951?

A. That is correct.

Q. And it was during that period of time that you knew the defendant Kremen?

A. That is right.

Q. Under what name did you know her, sir?

A. Well, I didn't know her as Shirley Kremens. As a matter of fact, I knew her only as Shirley.

Q. You didn't know her last name?

A. Well, I probably did at the time, but it didn't stick in my mind.

Q. Now during the period from the fall of 1949 to the fall of 1951, did you know Shirley during all of that period?

A. Well, yes, intermittently. I probably saw her at various times around the campus, I mean rather frequently.

Q. Was she a student at the Los Angeles City College at the same time? A. Yes, sir. [752]

Q. Did you hold any position in the student government at the Los Angeles City College?

A. Yes, sir; I was president of my freshman class of some 4,000 students.

Q. During the period that you knew this young

(Testimony of Robert Munger.)

lady as Shirley at the Los Angeles City College did you ever engage in conversation with her or in her presence? A. Frequently.

Q. What was the general subject matter, without specifying the particular subject matter, but what was the type of subject matter of these conversations? A. Well, almost——

Mr. Gladstein: Just a minute, young man, please. If your Honor please, I will object unless a proper foundation is placed as to time, place and persons present and the circumstances; this is a general wandering around of what happened in 1949.

The Court: I think you should not have called on the witness to make a general statement which would be conclusionary.

Mr. Schnacke: Yes, your Honor.

The Court: I think it would be better to go about it in the regular way.

Mr. Schnacke: Q. Do you recall the location of any or all of the conversations that you had with the defendant?

A. A great number of them, yes. [753]

Q. And where were they?

A. Well the—rather Shirley, usually, when I had occasion——

Q. Could you tell me specifically where they were; just locate a point? A. Yes.

Q. Where?

A. Frequently it would be in front of the cafeteria, or in front of the—on the library steps of the college, or at the south—let's see; that would be

(Testimony of Robert Munger.)

the southeast corner of the Administration Building.

Q. Now, Mr. Munger, do you recall any specific conversation that you had with Miss Kremen at any specific place?

A. Well, almost invariably the conversations dealt with political subjects.

Mr. Gladstein: I am going to object to that, if your Honor please, as not responsive.

Mr. Schnacke: I think that was not responsive. There is no objection to it being stricken.

The Court: It may go out. The answer may go out.

Mr. Schnacke: Q. During the fall of 1949, which was some years ago, do you recall specifically the day, occasion, persons present that any one conversation that you had with Miss Kremen?

A. Do you mean the exact calendar date?

Q. Do you remember any specific conversation, that is one [754] conversation at one specific place at anytime that you can identify and with any persons present that you can identify?

A. Yes, sir.

Q. And when did that occur?

A. Oh, well, that occurred—we had a conversation dealing with the same subject at all of the above three places, the previous three places that I mentioned, and that conversation dealt——

Mr. Gladstein: Just a second.

Mr. Schnacke: Q. Do I understand that you are thinking of a number of conversations over a

(Testimony of Robert Munger.)

period of time rather than one specific conversation? A. That is correct.

Q. And do you recall any specific conversation?

A. The subject matter of those conversations was the same.

Q. Now I understand that you recall the subject matter of a number of conversations, but what I am trying to find out, and just tell me as best you can, is whether you remember any one conversation more than any other; whether all of the conversations are part and parcel of your recollection or whether one of them stands out in your mind.

A. Yes, sir, one conversation that stands out in my mind is the conversation——

Mr. Gladstein: Just a minute.

Mr. Schnacke: Q. Well now, one does stand out in your [755] mind, is that right?

A. That is right.

Q. Do you recall who was present at that conversation?

A. The defendant was present along with a fellow whose first name was Ike, and his last name I probably won't be able to pronounce, but he identified himself as the leader of the Young Persons——

Mr. Gladstein: Just a moment.

Mr. Schnacke: Q. Without regard to that, you do remember somebody named Ike. Do you recall his last name? Have you any recollection of his last name?

A. I could identify him positively from a photograph, or from seeing him.

(Testimony of Robert Munger.)

Q. But you don't recall his last name now, sir?

A. No, sir, I recall him——

Q. Do you recall anyone else that was present at this conversation?

A. I recall the presence of a young lady named Dorothy Andrews.

Q. Do you recall anybody else?

A. I will recall them by sight but not by name.

Q. About how many people were present on this occasion?

A. Oh, I would say not over five or six.

Q. And where did this conversation occur?

A. The conversation occurred at the southeast corner of the [756] Administration Building.

Q. Was that a student gathering place of some sort?

A. For this particular group of students it seemed to be a gathering place, yes.

Q. Do you recall approximately when this conversation occurred, as closely as you can fix it by the year or by part of the year or by months, if you can fix it?

A. Well, it occurred during the—during the academic year starting the fall of 1949.

Q. And that academic year ran through the spring of 1950, is that right?

A. That is correct.

Q. So it was sometime in the fall of 1949 or the spring of '50? A. That is correct.

Q. Now to the best of your recollection can you recall what was said by you, what was said by Miss

(Testimony of Robert Munger.)

Kremen and what was said by other persons in her presence?

Mr. Gladstein: One moment sir. To which, if your Honor please, I object on the ground there is no foundation laid; it is incompetent, irrelevant and immaterial; it is remote; it is not probative of any issue in this indictment.

The Court: I can't see the materiality of it, counsel. The charge in the indictment is of an offense charged in 1953. You are going to have this young man tell about some [757] college conversation on a campus in 1949. It doesn't seem that it has some materiality.

Mr. Schnacke: We are dealing with a subject that requires a showing of knowledge whether the knowledge was acquired in 1949 or not.

The Court: I do not agree with you that the subject requires a showing of knowledge. There is a specific offense charged here that you have already presented evidence concerning. If you are talking about intent, that is a different matter. That would go into circumstances surrounding the offense. But there again you are confronted with the proximity of the circumstances that go to make up intent. The charge is that of violating a specific section of the Federal Statute referred to in this indictment alleged to have been committed in 1953 in August. I can't see any casual relationship to a college campus conversation in 1949.

Mr. Schnacke: Certainly familiarity of the de-

(Testimony of Robert Munger.)

fendants with the identity of the fugitives is a material element, if your Honor please.

Mr. Gladstein: There were no fugitives in 1949 and Mr. Schnacke well knows it. There is no such charge in the indictment.

The Court: You mean that you are offering the conversation for the purpose of showing an acquaintanceship of one of the defendants with one of the persons—— [758]

The Witness: Not a personal acquaintance.

The Court: ——with one of the persons who are named in this present indictment?

Mr. Schnacke: Not a personal acquaintanceship, no, your Honor, but a knowledge of the subject matter of the actions from which the fugitive status arose.

Mr. Gladstein: Your Honor seems puzzled; I am too. I don't understand the remark of Mr. Schnacke.

The Court: You mean that you want to show by this witness that the defendant who has been named had some knowledge of who the parties were that are named in this indictment?

Mr. Schnacke: That she had an acquaintanceship with the trials that were going on and I take it with some of the persons by name.

The Court: That may be true, but are you saying that you want to show that the defendant had a knowledge of who the defendants—the defendant Steinberg and the co-conspirator Thompson, are?

Mr. Schnacke: By name; yes, your Honor.

(Testimony of Robert Munger.)

The Court: And knew who they were at that time?

Mr. Schnacke: That she knew the name, yes, sir.

Mr. Gladstein: The name of what, Mr. Schnacke?

Mr. Schnacke: Of at least one of the defendants in the Smith Act trials that were underway or commencing. [759]

Mr. Gladstein: To which I object. Any person who read the newspapers in 1949 would have read the dozen names that were involved just as you would in any trial. That isn't probative of anything, if your Honor please. Mr. Schnacke isn't trying to establish any personal acquaintance.

Mr. Schnacke: That is certainly correct, your Honor. I don't purport to offer this as showing any personal acquaintanceship.

The Court: I think we had better discuss it further in the absence of the jury. It is time for the jury to take the afternoon recess anyhow. The court will remain in session. The jury will take the usual recess.

(Thereupon the jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

The Court: Now, Mr. Schnacke, I want you to be specific on this, because if there were any admission of testimony it would be have to be very narrowly and specifically limited with particular special subjects.

Mr. Leonard: Excuse me, Mr. Schnacke. Before we go into this colloquy, don't you think it would

(Testimony of Robert Munger.)

be desirable to excuse the witness from the courtroom?

Mr. Schnacke: I have no objection.

The Court: Mr. Munger, would you mind staying out of the courtroom until you are wanted.

(The witness Munger was thereupon excused from the courtroom.) [760]

The Court: I do feel that any conversation directed to some general discussion of general knowledge of the subject of these trials that were going on in New York would be too remote—1949——

I am not so certain, because I don't know what is in your mind, as to whether or not the inquiry would be directed specifically to some knowledge appearing by the defendant with respect to knowing who the defendant Thompson or defendant Steinberg was in 1949—who they were—that that might not, if confined to those narrow limits, be sufficient basis for testimony limited to that narrow point.

Mr. Schnacke: If Your Honor please, this testimony is very similar and was intended to prove much the same matter that the testimony of Mrs. Mecca and the proper testimony of the other witness was to prove.

We could establish through this witness that Shirley Kremen was a member of a group that was advocating a number of things on the Los Angeles City College campus; things which appear to me, and I think would appear to the jury if they were given the opportunity to examine them, indicative

of a strong familiarity with the left wing attitude, if I can phrase it in that fashion.

There were a number of elements to the proposals of the group to which Mrs. Kremen belonged. But one of the most significant was a strong attitude on the Smith Act, a strong [761] attitude regarding Smith Act prosecutions and particularly the prosecution involving these defendants which were in progress at that time.

Now, the best I can offer with respect to any of the defendants is to establish through this witness, as I understand it from conversations with him, the fact that the name "Robert Thompson" did arise in some conversation, and he is not sure that it arose or that the defendant Kremen used the name. However, the name did arise in her presence and there were comments made with respect to Thompson, for the record or something of that sort, to justify the attitude that he was being unfairly treated by the Smith Act trial.

That is the only evidence I can suggest that would fall within what Your Honor has suggested as being a direct connection with any of these fugitives here, and if Your Honor feels that that is remote——

The Court: Well, it isn't a question of my feelings, Mr. Schnacke. It is a question of keeping the trial within the proper limits or purpose of testimony.

This case involves a charge of harboring and involves the so-called accessory after the fact stat-

ute, and I see no reason in particular at this posture of the case, as I see it now, not passing on the weight of any evidence, why it is necessary to go back to 1949 to find out what conversations one of the defendants had on a campus in the university in [762] Southern California. What's that got to do with the charge of harboring or violation of the accessory after the fact statute? The offense charged occurred in August of 1953.

Mr. Schnacke: If Your Honor please, the defendant Kremen—. Well, let me put it this way: Certain of the defendants have been established to be members of the Communist Party. The fugitives were members of the Communist Party. I take it Your Honor has not accepted the Government's theory that this was a Communist Party conspiracy?

The Court: Well, I don't like the way you put that. I am not trying the questions of fact. That is for the jury.

Mr. Schnacke: We are not suggesting that be tried, if Your Honor please, but we are suggesting that the conspiracy was enclosed within a certain group.

Now, certainly the state of mind of people as young as Miss Kremen was at the University, her attitude towards political affairs, her attitude towards political affairs, her attitude toward the Smith Act trials, and her knowledge of that trial are all indicative of her state of mind as early as 1949 or the early part of 1950.

When we find her with that state of mind in 1949 and 1950, and find her in association with this group in 1953, the Government feels that there is a permissive inference from the combination of those circumstances that she, too, was a part of the conspiracy for the same reason that the other [763] persons were a part of the conspiracy.

The Court: Well, have you got more evidence? You have already put on a number of witnesses in this case. Are there more witnesses yet to come?

Mr. Schnacke: Very few more.

The Court: Concerning the circumstances——

Mr. Schnacke: Of the arrest?

The Court: Circumstances of the alleged harboring and violation of the accessory after the fact statute?

Mr. Schnacke: Well, it depends on what Your Honor terms the circumstances of the harboring and violation of the statute. They are all, of course, witnesses whom I believe are probative of facts necessary to establish.

The remaining witnesses will deal with the specific knowledge of the various defendants in connection with the Smith Act trials, and in certain cases their connection with other of the defendants. They will basically connect the defendants to Communist Party activities.

Mr. Foster: If your Honor please, one of the things we have to prove in this case is that the defendants knew Robert Thompson had committed an offense. It seems to me that any testimony which

will show that the defendants knew that the man was on trial is probative and evidence of the fact that—an inference can be drawn from that that at the time that the offense was committed she knew or he knew that [764] the defendant had been convicted on the offense, and notwithstanding that, harbored him.

That is absolutely necessary for this indictment. I mean, it must be proved. That is one of the elements that the Government must prove, that knowledge of the commission of the offense.

The Court: Well, of course I understand that.

Mr. Foster: The only way you could do that is through showing knowledge of the trials or knowledge of the offense. If you can show knowledge of the fact that a person knew he was convicted, it seems to me that is probative.

The Court: There are various ways of showing knowledge. You don't have to go back to a college campus to show that. I wouldn't if I were the United States Attorney trying the case.

All it does is open the door to asking the Court to rule on some almost fantastic questions in connection with the case that seem to me wholly unnecessary.

Mr. Schnacke: Well, we will submit the matter, Your Honor.

The Court: Well, is this young man—does he have to go back to his work with Uncle Sam right away today?

Mr. Schnacke: No, he advises me he has some-

thing like 16 more months to go, and he is at our disposal.

The Court: No, I mean does he have leave to come here as a witness? [765]

Mr. Schnacke: Yes.

The Court: Well, suppose after recess you go ahead with some other witnesses, and I will reserve ruling on it so that you may have an opportunity to give further thought to it. But the way it stands now, I don't think there is sufficient proximity to this testimony to warrant admitting it in evidence unless it were confined within extremely narrow limits as to a precise knowledge on the part of the defendant of who a certain man was and what is involved in this case.

Mr. Schnacke: If that is Your Honor's feeling, I would prefer to put him back on the stand for the balance of his cross examination and let him get on his way, because there would be nothing further to establish from him other than that and we might as well release him at this time and let him return.

The Court: Well, suit yourself on it. We will take a brief recess.

(Short recess.)

(Thereupon the jury reentered the jury box and the following proceedings were had in the presence of the jury.)

Mr. Schnacke: No further questions, if Your Honor please.

(Testimony of Robert Munger.)

Mr. Gladstein: No cross examination. I make a motion to strike the testimony of the witness.

The Court: The testimony of the witness as it now stands [766] is confined to his knowing the defendant at the University in 1949.

Do you wish the testimony—I don't see that it makes much difference one way or the other. However, are you going to move to strike it?

Mr. Gladstein: I do, Your Honor.

The Court: All right, the motion will be granted. That is all.

(Witness excused.)

Mr. Schnacke: John Lautner.

Mr. Leonard: Your Honor, before the next witness resumes the stand, in the light of the testimony of the last witness, the circumstances under which it developed and the colloquy between the prosecutor and the Court in the presence of the jury, putting of the witness on the stand for the purpose of obviously incompetent and irrelevant testimony, I move for a mistrial at this time on behalf of all defendants.

The Court: Well, the motion will be denied. The jury will disregard the testimony that was given by the witness. Up to the point at which the testimony reached it was innocuous, anyhow.

JOHN LAUTNER

was called as a witness on behalf of the Government, resumed the witness stand, and having been previously duly sworn, [767] testified further as follows:

The Clerk: You have been sworn, Mr. Lautner. Please take the stand.

The Witness: Yes.

Direct Examination—(Resumed)

Mr. Schnacke: Q. Mr. Lautner, you have previously been sworn and testified some days ago?

A. Yes.

Q. At that time, in the course of the testimony I asked the question that I will now restate to you: Did you in the year 1948 have a conversation with Mr. Robert Thompson?

Mr. Leonard: Objected to, if Your Honor please, on the ground that it is incompetent, irrelevant and immaterial and remote. I think that was the question upon which we recessed. The prosecution presented certain authorities to Your Honor, and we are prepared to argue the matter to Your Honor at any time Your Honor wants to hear it.

It seems to me that is too remote, a conversation in 1948. If Your Honor wants argument, I will be glad to be heard on it.

The Court: So the record will be clear, counsel, do I understand this was a conversation only between the witness and Thompson and was not a conversation in which any of the defendants in this case participated?

(Testimony of John Lautner.)

Mr. Schnacke: That is correct. [768]

The Court: Or which was called to their attention in any way upon which you have evidence?

Mr. Schnacke: The conversation was not called to their attention, that is right, Your Honor.

The Court: I will sustain the objection.

Mr. Schnacke: No further questions.

Cross Examination

Mr. Gladstein: Q. I have a few questions of the witness. Did you testify that in the year 1948 there was one or two conventions that you attended in New York City?

A. There were two conventions in 1948 in New York City: the state convention and a national convention.

Q. Would you be good enough to state when the state convention was held?

A. The state convention was held the week before the national convention in 1948.

Q. Oh, no, no, please.

A. In the summer. I think it was in July.

Q. Now, your answer to my question is that the state convention was held in July of 1948?

A. That is correct.

Q. Where was it held?

A. At Webster Hall.

Q. Where is that? [769]

A. That is, Webster Hall is in New York City near Third Avenue and Ninth Street or Tenth Street, thereabouts.

(Testimony of John Lautner.)

Q. How many days did it last?

A. It lasted a whole—it lasted Friday, evening, Saturday and Sunday.

Q. How many persons attended it?

A. This convention was attended by approximately about 350 persons. Anywheres from 350 to 400 or thereabouts.

Q. Which of the defendants did you say you saw at that convention? A. Sam Coleman.

Q. Anybody else?

A. I have no recollection at this time of anybody else being there.

Q. Now, the national convention was held about a week afterwards? A. That is correct.

Q. In other words, also in July or the first part of August? A. That's right.

Q. Of 1948? A. That is correct.

Q. Where was it held?

A. In Riverside Plaza. That is in New York City on 73rd Street near Riverside Drive and Western Avenue.

Q. How long did it last? [770]

A. It last three days.

Q. Do you remember the days of the week?

A. I don't—that was toward the end of July.

Q. How many persons attended it?

A. Well, approximately about anywheres from 150 to 200.

Q. Which, if any, of the defendants did you say that you saw there?

A. Sid Stein and Coleman and Carl Ross.

(Testimony of John Lautner.)

Q. You definitely saw Carl Ross there?

A. Yes. I was in charge of security and I checked them in.

Mr. Gladstein: I move that be stricken as not responsive to my question. I only asked if he saw him.

The Court: Very well.

Mr. Schnacke: Your question was definite and his answer was definite.

Mr. Gladstein: He doesn't have to give an argument or rationalization, Your Honor.

Mr. Gladstein: Q. You say you saw him there?

A. That is right.

Q. Upon how many occasions during the convention did you see him?

A. Well, I wouldn't know. I mean, he was there. I know I saw him, there.

Q. You know you saw him?

A. That is right. [771]

Q. And you know you saw him during that convention? A. That is correct.

Q. And you know that convention was in New York, not in Minneapolis?

A. That is correct.

Q. Could you be a little more precise, Mr. Lautner, about the dates of that convention in New York City when you saw Carl Ross there?

A. Well, I tried to be as precise as my recollection allows me to. It was toward the end of July in 1948.

Q. Is it possible for you in any way to be exact

(Testimony of John Lautner.)

about that? There are documents available to you, aren't there, in the press and elsewhere that would enable you to have the exact dates?

A. That is correct.

Q. So that you could without any trouble actually consult the public press and find the exact dates, couldn't you?

A. I could consult the "Daily Worker" or "Political Affairs".

Q. Or the public press?

A. I don't know what you mean by public press.

Q. I will ask you now if it isn't a fact that that convention was held in New York City between August 2nd and August 6th of 1948?

A. It could be. I know it was late in the summer.

Q. And I ask you once more, do you say on oath that you saw [772] Carl Ross at that convention? A. That's correct.

Mr. Gladstein: I have no further questions.

The Court: Anything else?

Redirect Examination

Mr. Schnacke: Q. Was Robert Thompson present at either of the conventions to which you have referred?

A. He was present at both conventions.

Q. At both?

Mr. Schnacke: That is all, sir, thank you.

The Court: That is all.

The Witness: Thank you, Your Honor.

(Witness excused.)

Mr. Schnacke: If Your Honor please, in the light of the way the witnesses have proceeded this afternoon, the Government would appreciate an opportunity to review the testimony of the remaining witnesses, who will be few, if any; and there will be one more witness that we are not ready to proceed with at the present time, and I would appreciate an adjournment at this time until tomorrow morning if convenient to the Court.

The Court: You have some witnesses to occupy tomorrow morning?

Mr. Schnacke: Yes, Your Honor. [773]

The Court: And will you also be ready to take up the matter of these exhibits that you have had marked?

Mr. Schnacke: Yes, Your Honor.

The Court: Will we need the jury for that, on the question of the exhibits? You were going to save that until all your witnesses have been presented?

Mr. Schnacke: Yes, I had intended to do that.

The Court: Any objection?

Mr. Gladstein: No objection, Your Honor.

The Court: Well, we will recess a little early then, today, members of the jury. I will ask you to particularly keep in mind that you are to exclude from your minds any matters which the Court has excluded today, particularly discussions under the rulings that the Court has made, and any testimony of the witnesses that has been stricken out by the Court.

I will instruct you further concerning that at a

later stage in the case, but I call it to your attention at this time so you won't unnecessarily carry it in your minds. You are to keep in mind only the testimony that has been discussed here and which has remained in the record.

Also keep in mind the admonition that I have given you not to talk about the case among yourselves or to let anybody else discuss it with you at home or at any other place, in any manner, shape or form. [774]

Also, I repeat my advice to you not to read any accounts in the newspapers concerning the trial because your minds may be led along lines that would not be conducive to the proper administration of justice, because they must be kept solely in tune with the actual evidence as it has been presented in the courtroom.

Likewise, I also caution you again not to form or express any opinion concerning the case until it is finally submitted to you.

We will recess now until tomorrow morning at 10 o'clock.

(Thereupon this cause was adjourned to Wednesday, April 21st, 1954, at the hour of 10 o'clock a.m.) [775]

The Clerk: United States vs. Kremen, et al, further trial.

Mr. Schnacke: Mr. Dahlgren.

HELDING L. DAHLGREN

was called as a witness on behalf of the Government, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the Jury?

A. Helding L. Dahlgren—D-a-h-l-g-r-e-n.

Direct Examination

Mr. Schnacke: Q. Mr. Dahlgren, what is your occupation?

A. Special Agent, Federal Bureau of Investigation.

Q. And for how long have you been employed by the Federal Bureau of Investigation?

A. About 11 and one-half years.

Q. And what is the nature of your work with the Federal Bureau of Investigation?

A. I am assigned to Washington, D. C., as an examiner of questioned documents.

Q. Have you had some special work or training or preparation [777] for that assignment?

A. Yes. I received my special training at the FBI laboratory, which consisted of reading numerous books on the subject of document identification, attending lectures and conferences, working with experienced examiners, and examining hundreds of cases involving typewriting, hand printing and handwriting.

Q. Are you a college graduate?

(Testimony of Helding L. Dahlgren.)

A. Yes, I am a graduate of Gustavus Adolphus College, St. Peter's, Minnesota.

Q. And your major course?

A. Majored in chemistry.

Q. In approximately how many cases have questioned documents been referred to you for examination?

A. Oh, it is rather difficult to say definitely the exact number, but I will say between eight and nine thousand cases.

Q. And how many documents have you examined in connection with those cases?

A. Well, many more thousands of documents in connection with these cases.

Q. Now, sir, I will show you Government's Exhibits 29 and 30 that have heretofore been identified as samples taken from a Remington Noiseless typewriter and a Royal typewriter, and ask if you have ever seen those documents before?

Mr. Gladstein: Did you say 29 and 30, Mr. Schnacke?

Mr. Schnacke: 29 and 30, yes, sir. [778]

The Witness: A. Yes, I have previously examined these at the FBI laboratory.

Mr. Schnacke: Q. And I will show you Government's Exhibits for identification numbered 31, 35 and 39, which are typewritten documents, and ask if you have heretofore seen those documents?

A. Yes, I have also examined these documents at the FBI laboratory.

Q. And did that examination constitute of mak-

(Testimony of Helding L. Dahlgren.)

ing a comparison between the last documents that you have seen and Government's Exhibits 29 and 30, the typewriter exemplars?

A. Yes, it did.

Q. On the basis of that comparison did you form an opinion about Government's Exhibits 31, 35 and 39? A. Yes, I did.

Q. And what was that opinion?

A. I reached a conclusion that——

Mr. Gladstein: Just a second, please. Your Honor, I would like to object to that upon the ground that the proper foundation has not been laid as to the time, the place, and the circumstances.

Mr. Schnacke: Of the examination? I will ask that question.

Mr. Schnacke: Q. When did you make that comparison, Mr. Dahlgren? [779]

A. In connection with Government's Exhibit 31, that was made, as I recall it, in February of 1954; and Government's Exhibits 35 and 39 were made in September 1953.

Q. And you have already testified that they were made at the Federal Bureau of Investigation laboratory in Washington, D. C.?

A. That is right, yes.

Q. Now, you say you did form an opinion with respect to the documents, and you were about to tell us what that opinion was.

A. Yes, sir. I reached a conclusion that Government's Exhibit 31 was prepared on the Rem-

(Testimony of Helding L. Dahlgren.)

ington Noiseless typewriter which is given number Government's Exhibit 29.

And I also reached a conclusion that a portion of Government's Exhibit 35, which is letter beginning, "Dear Friend," and dated October 22nd, was also prepared on the typewriter used to prepare Government's Exhibit 29, which is the noiseless typewriter.

Q. Now, what part of Exhibit 35 was prepared on that typewriter?

A. That is the part of Exhibit 35 which begins with page 3 and consists of nine pages.

Mr. Gladstein: Just a second. Would you have him identify what he meant by page 3? Page number 3?

Mr. Schnacke: Q. You mean the third page in the exhibit? [780]

A. The third page in this exhibit, yes.

Q. You mean starting from the third page and continuing for nine pages, including the third page?

A. That is correct.

Mr. Gladstein: Pardon the interruption. May I see that?

(Colloquy between counsel off the record.)

Mr. Schnacke: Q. And did you also make a comparison and arrive at a conclusion with respect to Government's Exhibit 39? A. Yes, I did.

Q. And what was that conclusion?

A. I reached the conclusion that a portion of Government's Exhibit 39 consisting of the first 12 pages of this exhibit were prepared on the type-

(Testimony of Helding L. Dahlgren.)

writer used to prepare Government's Exhibit 30, the Royal typewriter.

Q. Now, Exhibit 39 is an 18-page document, is it not? A. Yes, I believe it is.

Q. Did you arrive at any conclusion with respect to the last six pages of that document?

A. No, I did not.

Q. No conclusion at all?

A. No conclusion was reached. I did note some similarities in the typewriting on the last six pages.

Q. Were you able to identify the type of typewriter? A. Yes. [781]

Q. On which the last six pages were prepared?

A. Yes, I reached the conclusion it was prepared on a Remington Noiseless typewriter.

Q. The last six pages are carbons, are they not?

A. That is correct.

Q. Are they what you would call good carbons or poor carbons? That is, are they clear?

A. They are rather indistinct carbons and don't show clearly the typewriting characteristics.

Q. Now, sir, I will show you Government's Exhibits 37, 38 and 40, and ask you if you made the same type of comparison between those exhibits and the typewriting exemplars to which you have referred?

A. Yes. I reached a conclusion that the typewriter—that the typewriting on Government's Exhibits 37, 38 and 40 were prepared on the typewriter used to prepare Government's Exhibit 30.

Mr. Gladstein: Is that the Royal?

(Testimony of Helding L. Dahlgren.)

Mr. Schnacke: Tht is the Royal typewriter, yes.

Mr. Schnacke: Q. When you say was prepared on the typewriter, *the* mean the identical typewriter that prepared the exemplar is the typewriter that prepared the documents that you have referred to? A. That is correct.

Q. Not merely a typewriter of the same model?

A. No.

Q. Or the same style, but the same typewriter?

A. The same typewriter.

Q. The last documents to which you have referred, particularly Government's Exhibit 40, contains also some handwriting. But your conclusion was with respect to the typewriting on that document? A. That is correct.

Q. Now, sir, in connection with making your comparisons and arriving at your conclusions, did you prepare certain charts or exhibits to indicate the matters from which you arrived at your conclusions? A. Yes, I did.

Q. Would you be kind enough, with his Honor's permission, to give us an example of the known specimens from each of the typewriters and compare it with one of the documents that you have identified as being prepared on that typewriter? Do you have the charts with you?

A. Yes, I have the charts over at the side of the courtroom.

Q. Would you set them up and make that explanation, sir?

(Testimony of Helding L. Dahlgren.)

(Witness left the witness stand. Displaying charts to the jury.)

Mr. Gladstein: Your Honor, I don't think I—I don't want to interfere with the proper, normal development of the course of direct examination, but there has been no ruling [783] and, of course, there can't be. There isn't a proper foundation yet on materiality, and so on, as to the admissibility of any portion of these documents.

I am curious as to how I can protect and preserve the rights of my clients if in the course of explanation these enlarged copies are presented to the jury. These are not in evidence, and I don't know what the statements. Many of them may not be material at all to the case and might be properly inadmissible.

The Court: I suppose that the witness will take steps to show comparisons, is that correct?

Mr. Gladstein: I understand that will be his purpose.

The Court: Well, if it appears that the testimony goes beyond the admissibility of the documents, on the ground that it is part of the so-called expert testimony, then of course we will have to examine him to see whether or not the objection is good.

Mr. Leonard: Your Honor please, may I point out if all that is sought to be done is compare—I suppose these letters—large exemplars could have been blown up and shown to the jury.

I am not suggesting how they should try their

(Testimony of Helding L. Dahlgren.)

case, but in this case they are bringing in the actual content of documents which are not in evidence and to which, as I understand the record, Your Honor has sustained the objection. [784]

I submit that to present the contents of the documents is highly prejudicial. They could submit the letters and show similar characteristics of individual letters, but they deliberately photographed three or four feet high and are exhibiting to the jury the content of the documents which Your Honor has excluded from the evidence, and I submit that is prejudicial.

Mr. Schnacke: I think they have not yet been offered in evidence. I think the jury could be admonished at this time that these documents are not being offered for the content but merely for the purpose of illustration.

The Court: I think that should be clear, but I will make it clear to the jury that the only purpose of this examination is to demonstrate the reasons for the conclusion of the witness, and the contents themselves are not admissible in evidence as yet.

You may proceed.

The Witness: A. The enlargement on my left represents the Government's Exhibit 31, which I identified on the witness stand. And my right I have exemplars of the known typewriting specimens that were from the Remington Noiseless typewriter, which I also identified on the witness stand.

I compared these typewriting specimens with each other, and found certain characteristics which

(Testimony of Helding L. Dahlgren.)

were similar to both documents. I have pointed out some of them here which I will review briefly for you. [785]

I noted in *pre*paring the capital with the small letter "a" in the word "year" in the questioned document that it printed higher than the letter preceding it, "e", and the letter following it, which is "r". I found those came characteristics in the typewriting in the known typewriting specimen submitted. The "a" prints higher with respect to the "e" and the "r".

I also found that the lower left-hand portion of the capital "S" prints more heavily than the remainder of the letter. This characteristic was found to exist also in the known typewriting specimen.

I also found that the small letter "i" prints a little bit lower than the following letter "n" in the word "Greetings" in the questioned document. I found the same characteristic occurring in the known specimen.

In comparing the "a" with "s" I found the small letter "s" in the word "as" prints a little lower than the preceding letter "a". This characteristic also occurs in the word "words", and I noted the small letter "s" prints a little bit lower than the preceding letter "d". This characteristic also occurs in the known specimen to my right.

I also found that the upper left-hand portion of the capital "T" appears to print more heavily than the right-hand portion of the capital "T". This characteristic was also found in both the questioned

(Testimony of Helding L. Dahlgren.)

document and also in the known [786] document.

I also found that the small letter "e" prints heavier with respect to the "w" in the word "we" in the questioned document, and I found this same characteristic occurring in the known specimen.

I also found that the capital "R" in the upper left-hand portion of the "R" is damaged and broken off slightly, which is noted in the word "drive" in the questioned document and also found in the 'R" found in the word "drive" in the known document. Also in the word "Resolution" this damage was noted.

I also found that the capital letter "M" prints more heavily on the left than on the right side. This characteristic was also found in the capital letter "M" in the known specimen.

These are some of the characteristics which led me to believe—led me to the conclusion that the questioned exhibit No. 31 was prepared on the Remington noiseless typewriter, serial number as given on this document, X-370531.

Q. Now, would you make the same explanation with respect to the exemplar of the Royal typewriter in one of the documents that you say was prepared on the Royal typewriter?

A. Yes. The enlargement which I have on my left represents Government's Exhibit 40, and the enlargement on my right represents the known samples of typewriting obtained from the [787] Royal portable, Serial No. 0431783. In preparing those documents I found here also certain charac-

(Testimony of Helding L. Dahlgren.)

teristics in common which led to me to the conclusion that the typewriting on this exhibit, Government's Exhibit 40, was prepared on the Royal Portable typewriter used to prepare the exhibit which I have on my right.

I noted, for example, the capital letter "D" prints more heavily in the bottom portion of the letter on Government's Exhibit 40. I found the same characteristic occurring in the sample of known typewriting.

I found that the small letter "m" prints a little higher than the preceding letter "r" in the word "confirming" in the questioned document. I found the same characteristic occurring in the known specimen.

I found also that the lower right-hand portion of the capital "S" prints more heavily than the rest of the letter in the questioned document. I found the same characteristic occurring in the known specimen.

With respect to the letter "s" following the letter "n" "functions," I found that this letter "s" prints lower than the preceding letter "n". This characteristic was also found occurring in the questioned exhibit and also present, found to exist, in the known specimen.

I found that the right-hand portion of the capital "C" prints more heavily than the left-hand portion of the letter [788] "C", which is indicated in the word "committee" in the questioned document.

(Testimony of Helding L. Dahlgren.)

and also was found to exist in the known exemplar which I have on my right.

Also, I noted that the small "s" prints lower than the preceding letter "i" in the word "basis" in the questioned exhibit, and the same characteristic is found in the known exemplar.

Also in other places we find the "s" prints lower with respect to certain letters. For example, the "s" prints lower with respect to the letter "d" in the word "needs" and the same characteristic occurs in the questioned exhibit.

Also noted here is the small "p". It appears to slant slightly to the right and the upper portion seems to print a little bit sideways to the right in the questioned exhibit. The same characteristic occurs in the word "leadership", the last letter of that word in the known exhibit.

Those are some of the characteristics which I noted which led me to the conclusion that documents, among which are Government's Exhibits 40, were prepared on the Royal portable typewriter, Serial No. O-421783.

Q. And you made the same comparison of such characteristics in arriving at your conclusions with respect to other documents that you found demonstrated on some others?

A. Yes, that is correct.

Q. Now, in arriving at your conclusion as to these, did you [789] find any unexplained or unexplainable differences between the characteristics of the typewriting on our known specimen and the

(Testimony of Helding L. Dahlgren.)

specimens that you examined for comparison purposes?

A. No, I didn't find any unexplainable differences.

Mr. Schnacke: No further questions.

Cross Examination

Mr. Gladstein: Q. Did you find any differences, sir? A. I beg your pardon?

Q. Did you find any differences?

A. Sometimes in the darkness of the letter, but that is due to the pressure of the one doing the typewriting, and sometimes is due to the ribbon characteristics. If the ribbon is, say, very new, a lot of ink will be present in the ribbon and it will make a darker impression. Also, if the typist types lightly, the impression will not be as heavy. When you have the contrast between the right and left side, as this is, slanting will be detected.

Q. Did I understand you correctly, Mr. Dahlgren, you did find some differences between these documents which you attribute in some counts to the fact that the typewriter ribbon may have been different, in a different condition at the time that the—. What do you call these? The samples?

A. Samples.

Q. Were prepared and sent to you from the time that the typewriter was used, and in other instances, it might be [790] because the Mr. Erickson who prepared the samples, as he told us here, in San Francisco might type differently from whoever it

(Testimony of Helding L. Dahlgren.)

was who was the typist of the original document, is that right?

A. Yes. Also, this particular document is a carbon copy. When ever a carbon copy is prepared, on the carbon copy the impressions are a little bit wider because the type space has to go through not only the ribbon but also the first sheet of paper and then a carbon sheet of paper and then through the following sheets of paper.

Q. Yes. In other words, when you look at the second or third or fourth carbon, the sharpness of the characteristics is increasingly lost, to such a point that it becomes very difficult if not impossible to make an accurate test, isn't that right?

A. Yes.

Q. Then let me ask you this: Could you determine what carbon, whether it was the second, third, fourth or tenth in that document that you are looking at now, which is Exhibit 40 for identification?

A. I couldn't determine. It appears to me to be maybe the first or second.

Q. Did you, in making your test, Mr. Dahlgren, and in order to try to recreate as nearly as possible scientifically the same kind of conditions, did you make some carbons of the samples, [791] or did you have some carbons made of those samples so that you cou'd compare carbon to carbon rather than carbon to original?

A. Those that I used for comparison were originals. I didn't find it necessary to use carbons because——

(Testimony of Helding L. Dahlgren.)

Q. No? Your answer is, you did not have carbons made?

A. I didn't have carbons made.

Q. So you didn't compare carbons to carbons, but compared some of these carbons directly to the originals that were sent you by Mr. Erickson?

A. That is true.

Q. You have given us some of these characteristics that you pointed out that you say you find to be the same in both documents. For instance, you have mentioned the "s" is lower than the preceding letter in some instances, is that correct?

A. That is true.

Q. Did you mention that in some instances you find the "s" closer, in closer proximity to the preceding letter than other instances—in both instances, that characteristic?

A. Sometimes I found typewriting closer to one letter. It might be the letter to the right or might be that the "s" prints to the left. Sometimes a particular type face of typewriter, the type bar will be loose and they sometimes print to the right, sometimes to the left, sometimes high, sometimes low. Especially if it is pretty well worn. [792]

Q. Did you draw any conclusions from any finding, if you made a finding, that in both documents that you were comparing you found instances where two letters were abnormally close together?

A. Let's see. I can't think of any particular ones here in this document. There is one here which indicates the "f" appears quite close to the "o",

(Testimony of Helding L. Dahlgren.)

but it appears an erasure was made there and it may have been erased and reset their typewriter to type over that particular space to make the "f".

Q. Would you say that again, Mr. Dahlgren?

A. I pointed out an "f" being a little bit closer than normal to this "o". However, up here it isn't abnormally close. It is a normal space there.

Q. And how do you account for that?

A. There is evidence that the letter following "o", the original letter was erased and that the "f" was retyped in that space.

Q. Oh. That is the one Mr. Erickson sent you?

A. Yes.

Q. You didn't find a similar instance of erasing in the carbon you were examining?

A. No. Although——

Q. Well—. Did you complete your answer?

A. Although there are many other places where the "o" and "f" are together. Here is another which is comparable to that [793] particular "o-f".

Q. I will show you something. I am not an expert on this, but it looks to me that this "s" in the word "specified" drops below the "e".

A. Yes, to the left.

Q. Would you say that is a characteristic?

A. Characteristic of the "s". It might be that the "s" is loose and sometimes prints high and sometimes prints low.

Q. Look at the same thing on the document Mr. Erickson sent you. Am I right, the "s" isn't low?

(Testimony of Helding L. Dahlgren.)

A. Not in that particular one, but there are other copies where we find the "s" is low. Also, I note words that the "s" is high and low in the same word. There are words it sometimes prints high and sometimes low.

Q. And sometimes prints the way it should?

A. Yes.

Q. In other words, you are saying to me that in examining the typewriters—I mean examining the samples Mr. Erickson sent you, on the matter of that typewriting you found instances where it was jumping around, sometimes it would be high, sometimes low, sometimes in the middle? A. Yes.

Q. How can you draw a conclusion if you find, among other things, a situation based on the fact that the original document is carbon, you would find some instances where the "s" [794] is low?

A. Well, the "s" may appear low in certain places and it may appear normal in certain places. For example, with two letters like "s" and "n", and some other letters, if they are both high they will both be on the same level and one will not appear low in respect to the other.

Q. Generally speaking, a Royal portable typewriter of that general make and model has hundreds or thousands of that kind of machine made, isn't that right?

A. Yes, I imagine there are quite a number.

Q. And generally speaking each and every one of those Royal portable typewriters of that issue or manufacture appear to give the same kind of

(Testimony of Helding L. Dahlgren.)

appearance and type as we see here, isn't that right?

A. Well, I don't think they all give exactly the same.

Q. I didn't say exactly. A. Same style.

Q. That is right. Same style, same size type?

A. Yes.

Q. And the same structure? A. Correct.

Q. They are machine made and come out like a belt line proposition, isn't that right?

A. That is right.

Q. And they come from the same die, don't they? [795]

A. Yes.

Q. So that generally speaking two typewriters or twenty-two or two thousand twenty-two that are put out on the same type, same machinery, are just as alike as two peas in a pod, isn't that right?

A. No, they will have individual characteristics such as alignment.

Q. That is what I wanted to get. Where do they get individual characteristics? Alignment?

A. Through use and wear and tear of the typewriters differences will occur. And when the type faces are soldered to the type bar—that is done by hand—there may be slight variations to the right or left, and it will give individual characteristics on each and every typewriter, even though it is brand new.

Q. That is true, too, that with absolutely brand

(Testimony of Helding L. Dahlgren.)

new machines you will find something different between them? A. Yes.

Q. You are also going to find a lot of things that seem exactly the same about both of them, aren't you? A. That is true.

Q. As you go on using a typewriter what happens? They will develop a series of characteristics that differentiate it from another typewriter?

A. Yes, that is true. Using it develops certain characteristics [796] from wear and tear. Sometimes the type faces get damaged. All depends. Sometimes the typist that uses it will be extremely hard on the typewriter, use a lot of pressure, and so on, and that will in time cause certain characteristics to be reflected in the copy which is made.

Q. The type may get dirty, and that may make a difference in the impression?

A. Yes. Sometimes dirt will get on the type face and make a different impression.

Q. All right, now, did you—do you remember Mr. Schnacke asking you if you find any unexplainable characteristics—differences—unexplainable differences, I think you said, and I think you said you did not. Am I right, you did find differences between the two documents?

A. One is a carbon copy and the other an original, but no significant differences.

Q. But you found some, didn't you?

A. Well, the fact that one is a carbon and the other an original.

(Testimony of Helding L. Dahlgren,)

Q. You have told us that. Did you find any other differences?

A. I don't believe I found any that were significant.

Q. Did you look for differences? A. Yes.

Q. Did you make a note of any?

A. I didn't find any that were significant enough to make a [797] note.

Q. That was an opinion you held, isn't that right? A. That is right.

Q. You were looking to see and trying to prove, weren't you, that they came from the same typewriter?

A. Whether or not they came from the same typewriter.

Q. All right, whether or not. If you are looking to see whether or not, you look for characteristics that appear to be the same or similar on the one side and look for differences on the other; don't you true.

Q. Did you make a list of the differences?

A. I didn't find any that were significant enough to make a list of.

Q. You didn't, for instance, make a list, a notation of differences in this letter "s" which drops below the "e" in the word "specified" in the document No. 40 for identification, and the fact that in the same word, the same place in the sample, the letter "s" is on an even level of alignment with the letter "e", did you?

A. I noticed that and I noticed the same situa-

(Testimony of Helding L. Dahlgren.)

tion in other places on several "e-s" combinations. You point out an "e-s" here and I noticed a "e-s" in the same word on the same level.

Q. Yes.

A. As over here (indicating).

Q. You did notice them? [798]

A. I noticed it, yes.

Q. You noticed that there were quite a number of instances where you get the capital "e-s" in one document that doesn't look at all like the capital "e-s" in the other? A. That is true.

Q. And you assign it to the fact that the "s" in the typewriter apparently may be inclined to be loose or jumping around?

A. Yes. I consider that a good characteristic.

Q. Then, if that is so, how do you justify using the location of the "s" any place in either of these documents as grounds for saying that they have a common characteristic?

A. Because of the occurrence in so many places.

Q. What occurs in so many places?

A. The "s" is low with respect to the preceding letter in so many instances in both the questioned and other documents.

Q. And you found the "s" higher in alignment in many places in one document than you did in another, didn't you? A. In some cases, yes.

Q. Then what you did was this: Wherever you found those instances which looked pretty much alike, you called those common characteristics. Wherever you found a difference you discarded it

(Testimony of Helding L. Dahlgren.)

and didn't pay any attention to it, isn't that right?

A. I noticed it and did pay attention to it.

Q. Is it characteristic of the typewriters, when you find that these documents, one of which is one of the ones taken from the ones Mr. Erickson sent you and the other indicating maybe was taken from it, is it characteristic of both documents if you find differences in the way the "s" strikes?

A. We are talking about the "s", characteristics of the "s" and the fact that it strikes high sometimes but low very many times, and that is a characteristic of the "s". That was used as a point of identifying the two documents together.

Q. If it is loose, is there any way of knowing, if it is loose, whether it is going to strike high, low or in alignment?

A. I found in many instances where it does strike low with respect to the preceding letter.

Q. And in many cases sometimes in alignment?

A. Yes.

Q. And in many cases high?

A. In some instances it strikes even with the preceding letter.

Q. In addition to those——. I have just asked you about the "s" following the "e". I haven't studied these, but as you were testifying I noticed that there were—seemed to be other examples.

Did you find there were other letters or combinations of letters, where just as in the case of the "s" and the "e-s" we have been talking about, you found there were any differences [800] that you attribute

(Testimony of Helding L. Dahlgren.)

either to looseness of the type or some other cause?

A. Yes. I pointed out certain——. In this particular instance I pointed out the "n" was higher with respect to the "r".

Q. The "m" is higher than the "d" is?

A. Yes.

Q. And you found the same thing over there in the other? A. Yes.

Q. I notice the capital "C" in the document for identification is below the capital "P"; isn't it?

A. Well, it appears low. I think it is because the "C" prints very heavy there and this is a carbon copy and the ink impression is spread.

Q. It appears to be lower?

A. It appears to be lower.

Q. In the one Mr. Erickson sent you it doesn't appear to be lower at all, does it?

A. Yes, I would say it is a little bit lower.

Q. You say that Capital "C" is lower than the "n"? A. Yes.

Q. Is there a way of measuring that? You would have——

A. (Interposing): I guess there is.

Q. You would have to take a level of some kind to get a true horizontal plane, wouldn't you? [801]

A. I guess so.

Q. You didn't do that?

A. To my eye it appears low.

Q. To your eye this capital "C" I am pointing to seems to be low, is that right?

(Testimony of Helding L. Dahlgren:)

A. It is printed heavier, places more ink on the page, stronger impression.

Q. This must be some other page. It doesn't appear there, is that right?

A. I guess that is right.

Q. Something has been skipped. Well, let's see. Let's take what you have there. This "p" in "implement" is considerably lower than the "m" or the "tm", that's right?

A. It appears the "p" is a little bit lower and the "m" is higher with respect to the "r", and probably higher with respect to the "t".

The Court: Just a moment. I don't know whether the jurors can hear you. You had better speak a little louder.

Mr. Gladstein: Q. The word "implement" in the exhibit for identification seems to be considerably out of alignment, doesn't it?

A. I think the "p" is low. I guess that is the main difference.

Q. What about the "p" and "m"? Doesn't that seem out of alignment? [802]

A. It seems to be a little high.

Q. Let's take a look at the same word in the one Mr. Erickson sent you. That seems to be in pretty good alignment all the way through, doesn't it?

A. Well, I pointed out previously——. Well, it isn't too bad. The "m" is a little bit higher.

Q. That word "implement" you are looking at now is in pretty good alignment?

(Testimony of Helding L. Dahlgren.)

A. The letters are pretty well aligned.

Q. And the comparison in contrast thereof you would find on the carbon copies, isn't it?

A. There isn't too much difference. The "i" is just a little bit higher. That is a characteristic I pointed out before.

Q. The question of whether or not in a word a letter will be out of alignment or in alignment, but especially a group of letters, might very well depend on that part of the carriage which has to do with the maintenance and set of the horizontal plane for the typewriter, isn't that right?

A. Usually it is due to the fact that—the condition of the type bar, whether it is loose or properly tight. If it is loose it might strike a little high or a little low. Also could be dependent on what we call the platen or roller on which the base is built.

Q. That is what I was getting at.

A. If the roller is pitted in different places, it will [803] cause different impressions.

Q. So I could take a typewriter and type a document on it, and then if I loosened either the bar or the roller in the course of time with use, or maybe if I did it deliberately, and I took the same typewriter to write the same content of a letter, that would appear considerably different because there wouldn't be the same control to create the same horizontal alignment, isn't that right?

A. Maybe over a period of years if it was worn, that characteristic would develop as time goes on.

Q. So you would get differences although both

(Testimony of Helding L. Dahlgren.)

documents came from the same typewriter, isn't that right?

A. It is possible over a period of years.

Q. And by the same token, you could get two documents from two different typewriters that appeared the same in some respects because of the fact, not that the type was involved, but the roller in one proportion of use is used, isn't that right?

A. There could be similarities between the two documents, yes.

Mr. Gladstein: You can resume your seat, Mr. Dahlgren, if you like.

(Witness resumed the witness stand.)

Mr. Gladstein: Q. Tell me, Mr. Dahlgren, did you—I gather from your testimony you have already described what [804] your examination consisted of. A. That is right.

Q. You have told the jury everything you did in order to determine in your own mind whether the same typewriter was the one from which Mr. Erickson's samples came and from which these exhibits for identification came, is that right?

A. Yes. I pointed out certain characteristics I found which led me to the conclusion which I stated.

Q. Yes. But I say you have told us everything you did?

A. Yes, in essence I have, yes.

Q. You didn't, I take it, then, if I understand you correctly you didn't have specimens or samples typed on onionskin or thin paper of that kind to make a comparison, did you?

(Testimony of Helding L. Dahlgren.)

A. I think it was regular bond paper that the specimens were submitted on.

Q. I say you yourself have that done, or have available for your use, or actually in use, any typed extract or sample on a piece of onionskin, did you?

A. You mean a known specimen?

Q. Yes. A. No.

Q. In other words, you didn't do this: You didn't have the specimens typed on translucent or transparent thin onionskin paper with the same text as the exhibits for identification and then go to the window and place one up against the other [805] and see whether they were in alignment? You didn't do that, did you? A. No.

Q. Well, if you want to know whether a particular typewriter is the source of two different documents, and you have one document that you think it might have come from there, isn't it the absolute fact that if you used the method of typing the same content, the same text onto pieces of onionskin and then go up against a light and put one against the other, you can see where the "p" may be and the "s" may be and the other letters in the combination, isn't that right?

A. We have found in our experience the side by side comparison is more effective, usually, in studying the differences and similarities between typewriters, instead of placing one on top of the other.

Q. You have found that superimposing one on

(Testimony of Helding L. Dahlgren.)

the other doesn't do as good as looking at them side by side, is that right?

A. Well, usually——

Q. Is that the fact, sir?

A. Yes, that is right. Side by side comparison is the method we use.

Q. But it is clear, isn't it, Mr. Dahlgren, that whatever steps you took, you didn't use at all any part of the method of superimposing a sample on transparent paper on to the questioned documents?

A. No.

Q. That is right? A. That is right.

Q. Mr. Dahlgren, I take it from your testimony that you didn't examine the typewriters, either, did you? A. No, I did not.

Q. Is it not helpful if you have the typewriters, to examine those and check your conclusions?

A. Well, in this particular case it wasn't necessary because I found I could identify one with the other without that.

Q. In your practice did you ever call for the typewriters themselves?

A. Not very often.

Q. So it isn't your practice to call for the typewriter, is that right? A. That is correct.

Q. But now if you have the typewriter, Mr. Dahlgren, of course you can make a visual examination and determine whether there is a loose bar or a loose letter or something else in the mechanism that will account for a letter being low rather than that it is a common characteristic, can't you?

(Testimony of Helding L. Dahlgren.)

A. Well, I think we can reach the same conclusion with typewritten copy obtained from the typewriter.

Q. Well, you say you think you can. But it is true, isn't it, that the best evidence of the matter would be a test— [807] an examination of the typewriter itself, isn't that right?

A. Well, I found in this particular case the documents as submitted were sufficient to enable me to reach the conclusion.

Q. Now, let me ask you this: I take it from your testimony you didn't ask Mr. Erickson or somebody else in the FBI to take a photograph of the type, did you?

A. No. They submitted the original typewritten specimen.

Q. As an expert in this field, don't you know, sir, and is this a fact, Mr. Dahlgren, that the most positive method for identification is by means of the use of photographs of the faces of the typewriter type?

A. Well, that might be the opinion of an author of some book or something, but we haven't found that that is necessarily true.

Q. You said in the course of your examination, I believe, in preparation you read a lot of books on the subject. You have heard of a man named Osborne? A. Yes.

Q. Albert S. Osborne, isn't it? A. Yes.

Q. He is the granddaddy in this field, isn't he?

(Testimony of Helding L. Dahlgren.)

A. He was a pioneer in the field of document examination.

Q. And who was a renowned authority?

A. Quite famous, yes.

Q. Don't you know he has written that "Stereoscope photomicrograph [808] of the faces of typewriter type showing the effect of wear and accidents are the most positive method by which you can get identification"?

A. Might be in the matter of identification, but in our ex erience we have found simply using the typewriter specimens from typewriters are just as effective.

Q. And looking at it side by side?

A. That is right.

Q. But then, of course, it depends on — it is really, in the last analysis, depending on what something appears to you to be like, that might *to be* appear to be a little different because I might not have 20/20 vision or you might not, isn't that right?

A. Well, we usually have pretty good vision as document examiners.

Q. But there is a more objective and scientific way to do it, the way I have read that Mr. Osborne suggests, isn't that right?

A. I don't believe I agree with Mr. Osborne on that point.

Q. I see. All right.

The Court: What is it, that the main fundamental of this science, if you can call it a science,

(Testimony of Helding L. Dahlgren.)

of examination is the characteristics rather than the comparison of the physical object itself?

A. That is right. The characteristics result from the [809] typing.

Mr. Gladstein: Q. How many characteristics do you—if you have such a standard—how many characteristics that seem to be the same in two documents do you use as a minimum, or what do you regard as a reliable standard?

A. In typewriting as well as handwriting we don't have any particular number. It depends on the strength of each individual characteristic. If we find that a number of characteristics—say they are very strong, then we would require fewer points of identification.

Q. Even just two or three?

A. Well, I don't remember any case where I have had just two or three. Usually more than that.

Q. How many?

A. Oh, it is hard to say. Maybe, if I were guessing, I would say maybe eight or more.

Q. How many did you look for in the documents that you were examining for this case?

A. I didn't look for any particular number. I found quite a number of them.

Q. Do you know how many you found in each of these documents? A. No, I don't.

Q. I take it you have already told us you didn't keep any record of the number of differences you found, is that right?

(Testimony of Helding L. Dahlgren.)

A. No, sir. As I mentioned before, I didn't find any [810] significant differences.

Q. When you say "significant", that is just a personal opinion and conclusion based on what appears to you to be a fact?

A. Based on my experience.

Q. Based on what it looked like to you, isn't it?

A. That is right.

Q. I have had no experience, but if I were to say—if you turned this over to me and if I had looked at this thing, I see an "s" which is low when it comes after the letter "d" in the word "Needs" in both documents, you would say, "Well, that's a characteristic", isn't that right?

A. That is not the only way.

Q. No, but I say you would say that is a characteristic? A. That is a characteristic.

Q. Yes. I think you probably would have determined there are a number of characteristics, is that right?

A. That is right. In that particular word there are a number of characteristics.

Q. Is it not a fact, you would be relying not on any experience, but simply on what it appeared to be, based on just visual inspection?

A. Yes, on all the characteristics.

Q. Mr. Dahlgren, am I right you didn't determine when any of these particular questioned documents came into existence? [811]

A. No, I didn't know when they were typed.

(Testimony of Helding L. Dahlgren.)

Q. And you don't know where they were typed, do you? A. No.

Q. And you don't know by whom they were typed, do you? A. No.

Mr. Gladstein: Would Your Honor give me just a moment?

The Court: Yes.

Mr. Gladstein: I believe that is all, Your Honor.

The Court: Anything else?

Mr. Schnacke: That is all, sir: thank you.

The Witness: Thank you.

(Witness excused.)

The Court: Shall we take the recess now?

We will take the mid-morning recess now, members of the jury.

(Short recess.) [812]

Mr. Schnacke: If Your Honor please, with respect to the documents that the last witness just spoke of, I will reserve offering those. I will offer those at the same time other documents are offered, and I presume Your Honor would prefer that offer be made in the absence of the jury.

Mr. Gladstein: That is satisfactory.

The Court: You want to do that now or have you something to present now?

Mr. Schnacke: I have one other matter to put in now.

If Your Honor please, at this time the Government will offer in evidence an authenticated copy of the records of the District Court of the United States for the Southern District of New York, the

document authenticated being a bench warrant issued for Sidney Stein on June 20, 1951.

The Clerk: Plaintiff's Exhibit 120 introduced and filed in evidence.

Mr. Leonard: May we examine it?

Mr. Gladstein: I have already examined it. I have no objection based on the authenticity of it. I do object to it upon the ground that no proper foundation has been laid; it is not probative of the issues in the indictment. Your Honor will notice that there is no return of service and no foundation, and therefore it is incompetent, irrelevant and immaterial.

The Court: Well, I see no merit to the objection to the admissibility of this document. Overruled. It may be admitted. [813]

The Clerk: Plaintiff's Exhibit No. 120 admitted in evidence.

(Thereupon bench warrant for Sidney Stein identified above was received in evidence and marked Government's Exhibit No. 120.)

Mr. Schnacke: Your Honor, the Government will offer as the exhibit next in order an authenticated copy of the records of the District Court of the United States for the Southern District of New York containing the indictment in United States of America vs. Sidney Stein. It is the indictment referred to in the warrant; and the judgment and commitment of that court in the case of United States of America vs. Robert Thompson.

Mr. Gladstein: I have an objection to these documents—separate objections to them, however, again

not based on any question of their authenticity, though I have never seen them before but I assume that they are accurate. One question I have is as to the completeness of the documents; another question I have as to one of the documents is that it is not competent, relevant or material in this case because it is in material variance from the indictment. That is a matter I am sure Your Honor would not want to have the jury hear argument on, these questions of law. The portion I am referring to has to do with the portion dealing with Robert Thompson.

Mr. Schnacke: I think he is referring, Your Honor, to the last document of the two. There is a very moderate variance, certainly no material variance.

The Court: Are there any other documents?

Mr. Schnacke: Yes, Your Honor; the original warrant issued by the Southern District of New York for the arrest of Robert Thompson dated July 2, 1951.

The Court: Aren't these matters covered in an opinion that I read from the United States District Court of New York with respect to the questions involved?

Mr. Gladstein: I don't think so, Your Honor: I haven't seen any such opinion.

The Court: I have. I have it. In the opinion and judgment of the judge of the United States District Court, he recites all the facts, and it is a matter of record as to what disposition was made of Thompson by the United States District Court.

Mr. Schnacke: Yes, Your Honor.

Mr. Gladstein: There may be an opinion; I haven't seen it.

The Court: I have got it. The trial was had and conviction was had.

Mr. Gladstein: Not on this charge, if Your Honor please; it has nothing to do with this case.

The Court: Not this case, but on the charge of not [815] having submitted to the process of the Court with respect to the judgment in this case.

Mr. Gladstein: Yes. Well, that is immaterial.

Mr. Schnacke: The District Court did rule on that, Your Honor.

Mr. Gladstein: That, if Your Honor please, is not material to this case, and this last document that Mr. Schnacke handed up to the Court is incompetent, irrelevant and immaterial to this case and not within the issues framed by the indictment. The case to which Your Honor refers, while I haven't seen the opinion, is one where I think the charge was one of criminal contempt. There is no charge specified in this indictment of anybody assisting in the commission of any such offense, and therefore——

The Court: All I was referring to was that in this opinion and judgment of the court there is a reference to the process of the court that was involved. The court found that Thompson did not obey.

Mr. Schnacke: Yes, Your Honor.

The Court: It is all a matter of record in the court there.

Mr. Schnacke: In the Southern District of New York, yes, Your Honor.

The Court: It is published in the Report.

Mr. Gladstein: If Your Honor please, I don't think that [816] is a matter which ought to be discussed in the presence of the jury, because we have some views on legal matters to present to the Court.

The Court: Do you want to argue the admissibility of these documents?

Mr. Gladstein: Yes, indeed, your Honor.

The Court: The last one, the bench warrant, will be number 122, will it?

The Clerk: I haven't marked any of them yet. Shall I mark them for identification, your Honor?

The Court: I have already admitted 120, the certified copy of the bench warrant.

The Clerk: Yes, you have, sir.

The Court: 121——

The Clerk: Shall I mark that?

The Court: That is 121, the records with respect to both Thompson and Steinberg.

The Clerk: Plaintiff's Exhibit 121 marked for identification.

(Thereupon records identified above re Sidney Stein and Robert Thompson, were marked Government's Exhibit No. 121 for identification.)

The Clerk: And Plaintiff's Exhibit 122 marked for identification.

The Court: That is the last document entitled [817] "Bench warrant"?

The Clerk: Yes, sir.

(Thereupon bench warrant for the arrest of Robert Thompson referred to above was marked Government's Exhibit No. 122 for identification.)

The Court: Are there any other matters?

Mr. Schnacke: The Government would desire at this time to offer in evidence a number of documents that have heretofore been marked for identification. I think there will be objection to them, and we have no objection to the matter being heard out of the presence of the jury if that is the desire of the Court.

The Court: I think I had better excuse the jury at this time.

Mr. Gladstein: Yes. I wonder if Mr. Schnacke would be good enough to tell us if there are going to be any further witnesses presented by the prosecution?

Mr. Schnacke: There will be no further witnesses.

The Court: Members of the jury: the Court will have to pass on some exhibits in this matter: it may take some time. The jury will be excused until 2:30 this afternoon. Please bear in mind the admonition of the Court.

Mr. Leonard: Your Honor, I wonder, before the jury is excused, ——Mr. Schnacke has indicated there will be no other [818] witnesses so that when we are through with these matters that will conclude the prosecution's case. If that is true, may I

suggest to your Honor that the defense will have some motions to direct to the Court.

The Court: Yes, but you cannot make your motions until the Court has ruled on the evidence.

Mr. Leonard: I thought possibly we could save the jury coming back, because we probably will have some legal arguments; that is the only reason I suggested it.

The Court: The jury has to be here when the documents are ruled on.

Mr. Leonard: Very well.

The Court: There will be time enough to send them away afterwards.

(Thereupon the jury was excused from the court room.)

(Proceedings out of the presence of the jury reported, but not transcribed.)

(Thereupon a recess was taken to the hour of 1:30 o'clock p.m. this date.) [819]

(Proceedings outside the presence of the Jury were reported but not transcribed and made a part of this transcript.)

(At the hour of 2:30 o'clock p.m., the Jury resumed their places in the Jury Box and the following proceedings were had in the presence of the Jury.)

Mr. Schnacke: With the permission of the Court I would like to call to the attention of the Jury at this time, if I may, certain exhibits that have been received in evidence.

Government's Exhibit 90, which is the exhibit to which Agent Dunker testified as being contained in

a wallet found in the tan cotton pants in a chair in the living room, contains a number of documents:

State of Missouri operator's license in the name of William Gordon;

A State of Montana fishing license in the name of Helen Gordon;

A social security card in the name of William Gordon;

A three-day fishing permit, State of Mississippi, in the name of William B. Gordon;

A Missouri motor vehicle registration slip in the name of William Gordon;

A YMCA card from Patterson, New Jersey, in the name of [820] William Gordon;

A Missouri fishing license in the name of William Gordon;

A membership card in the United Office and Professional Workers of America, with stamp attached, in the name of William Gordon;

A hunting and fishing license folder, compliments of Southern Bell Telephone Company, apparently a container for a fishing license, with the name of William Gordon written on it;

A State of Montana Fishing license in the name of William Gordon.

Government's Exhibit 91 was also testified to by Mr. Dunker as being found in the tan gabardine pants found on a chair in the living room:

A social security card in the name of Robert Newman;

A Youngmen's Christian Association card from New Haven, Conecticut, Robert Newman;

A non-resident fishing license from Wisconsin, R. E. Newman;

A State of Oregon original license, non-resident anglers' license, in the name of R. Newman;

A Michigan non-resident fishing license in the name R. E. Newman;

A State of California operator's license in the name of Robert Edward Newman; [821]

A State of California sporting fishing license in the name of Robert E. Newman;

A Hayward public library card, Robert E. Newman;

An Iowa liquor permit, Robert E. Newman;

A California fishing license with some stamps attached, Robert E. Newman;

An Oregon Game Commission salmon steelhead punch card, bearing a number but no name;

A document that reads, "Local persons beneficiary brother or sis no he's a cousin." Below that, "Local Police, rear of libe ref room. Atlas open to map of California. Person entering carries Colliers."

And another scrap of paper that reads, "Hudson Restaurant six and seven p.m. Hard trip. Means Marge gets car."

Government's Exhibit 120, a bench warrant issued for Sidney Stein by the Southern District of New York and dated June 20, 1951.

And the indictment to which the bench warrant refers, "United States of America vs." various persons, including Sidney Stein, charging a violation of Section 3 of the Fifth Act and Section 11, and

United States Code, Title 18, Section 321, which is a conspiracy charge.

And the judgment and commitment of the District Court of the United States for the Southern District of New York in United States against Robert Thompson, adjudging Robert Thompson [822] guilty of the offense of unlawfully, willfully and knowingly conspiring to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and willfully to advocate and teach the duty and necessity of so overthrowing and destroying the Government of the United States, Title 18, Sections 11 and 13, United States Code."

That is signed by the District Judge and is dated as being on the 21st day of October, 1949.

Government's Exhibit 122 is a bench warrant issued by the Court in the Southern District of New York against Robert Thompson, based on the conviction, and dated July 2nd, 1951.

Your Honor please, the Government has no further witnesses in this matter and, subject to your Honor's ruling on the Government's motion for admission of all evidence against all defendants, the Government will rest at this time.

The Court: I take it counsel wants to present the motions that were referred to in the absence of the Jury?

Mr. Gladstein: That is correct, your Honor.

The Court: Under the circumstances, Members

of the Jury, since insofar as you are concerned, except for the Court's ruling on one motion, the Government's case is completed, and since there are no motions to be presented which require your [823] attendance to hear; and in order to facilitate the completion of the case, as a result of discussions the Court has had with counsel, I am going to excuse the Jury now until Friday morning at ten o'clock.

As a result of the Court and Counsel spending time in this matter tomorrow, I am reasonably certain that the case will proceed on Friday morning to its final stages. Therefore, it will serve no useful purpose to have the Jury come back and then be dismissed again tomorrow.

That will keep you away from the Court until Friday morning at ten o'clock. During that period of time, I ask you to be particularly cautious in observing the instructions I have heretofore given you. I shall take the liberty of repeating them to you again, namely, that you do not discuss the case among yourselves or with anyone else, either at home or any place else; that you do not read or listen to any discussions of any kind concerning the case; that you keep your minds free and open; that you form no opinion or conclusions in the matter whatever.

The Court will remain in session. The Jury will be dismissed until Friday morning at ten o'clock.

(Thereupon the Jury retired from the court room.)

The Court: Now, if counsel feel they can better

equip themselves by taking up all the arguments tomorrow—both sides, as they have indicated, prefer to—it is agreeable to [824] the Court and you can make all the legal arguments tomorrow, on the assumption that arguments would start Friday morning—although I am only giving that as an assumption. I am not intending in any way to indicate what course counsel could take.

I would like to have, also, the proposed instructions from the defense so that we can, also subject to such disposition as may be made in the matter tomorrow, settle the instructions to comply with the Federal Rules of Criminal Procedure which require the Court to advise counsel before argument as to the instructions. You will probably be able to do that?

Mr. Gladstein: Yes.

Mr. Schnacke: Yes.

The Court: All right, we will take a recess until tomorrow morning at ten o'clock.

(Thereupon this cause was adjourned until Thursday, April 22nd, 1954, at the hour of 10:00 o'clock a.m.) [825]

Monday, April 26, 1954

INSTRUCTIONS TO THE JURY

The Court: Members of the jury:

It is very obvious to the Court that this jury, unseasoned as some of you are, have given very commendable attention to the evidence during the past days of the trial, and to the arguments of the lawyers.

I have some instructions to give you which I think may be of help to you in resolving the issues that you have to determine in this case.

First let me say to you that you and I have a common purpose, although we have somewhat different functions to perform. It is the duty of the jury in every criminal case to decide the questions of fact involved. In this case the question of fact is the guilt or innocence of the defendant. Now, ordinarily the Judge does not interfere with that in any way. He finds it more or less his duty to abstain from, except in cases where it is considered proper under the circumstances, from making any comment on the facts, and he leaves to the jury exclusively the function of deciding the facts.

Likewise, it is the duty of the Judge to tell the jury what the law is. It is the duty of the jury to accept that statement as correct. You've just got to assume, rightly or wrongly, that a judge knows what he is talking about when he tells you what the law is. [1]

I say that to you because it sometimes happens that some citizens come into the jury box with some preconceived notions about social or economic theories, or even legal theories, and they proceed to apply them, and that we say is wrong and we can't permit you to do that because no person's life or liberty or property would be safe under those conditions. Hence it is you must accept the statement the Judge makes as to what the law is and apply it.

So, in a manner of speaking, while we have these different functions to perform, we are a team be-

cause our common objective is to accomplish justice.

Now, in deciding this case you are not to be guided by any elements of prejudice or sympathy, either prejudice against the defendants or sympathy for them. I told you when you were impanelled that there was no presumption by virtue of the filing of the indictment that the defendants or any of them were guilty of the offense charged against them. I repeat it to you now, that there is no such presumption, because under our law the defendant charged with a criminal offense is presumed to be innocent, and that presumption continues until such time as the Government has proved beyond a preponderance of the evidence that the defendant or defendants are guilty. Beyond a reasonable doubt, I should say, not a preponderance of the evidence,—beyond a reasonable doubt that the defendants are guilty. [2]

The burden of proving the defendants guilty beyond a reasonable doubt is on the Government. It never shifts to the defendants. Defendants never have the duty of proving their innocence, which is true, as I told you at the time you were impanelled, in some of the continental systems of law.

Now, what do we mean when we say that the burden is on the part of the Government to prove the guilt of the defendants beyond a reasonable doubt? What does the term "reasonable doubt" mean?

The definition that I give the jury is a very simple one. I say that the term "reasonable doubt" means just exactly what it implies. It means a

doubt based on reason. It is a doubt that results from using your thinking processes, using your head.

It is not the kind of a doubt that you have that is fanciful or conjectural or speculative, something that you reach up into the sky to get, but it is a doubt that results if after you have applied your minds to the problem you hesitate as you would in some important decision that you would have to make in your own life.

That is what we mean when we say "reasonable doubt". Perhaps I haven't explained it to you in the technical language that some judges do. I don't intend to use, if I can help it, any technical language in the remarks that I have to make to you, because I believe that juries, coming as they do from all [3] walks of life into our courts, should be spoken to in the language that they ordinarily use, and not in the hypertechnical and sometimes hifaluting language that judges use.

So what I have to say to you may not look so well in writing hereafter, but I have an abiding belief from my experience over many years that juries understand better when they are spoken to in the language they commonly use.

Now, members of the jury, there are some rules that apply in all criminal cases. I shall colloquially give you a few of them that may be of help to you in this case.

First of all, I want to say to you that during the course of the trial the Court has made some comments in ruling on evidence or excluding evi-

dence, or in ruling on objections that the lawyers have made to the evidence, and discussions have resulted between the Court and counsel regarding those matters. Now, you are not to draw from any of the discussions or any of the remarks that the Court made that the Court was intending to indicate how the Court felt upon the subject of the guilt or innocence of the defendants, or what your verdict should be, because I haven't any opinion as to the guilt or innocence of the defendants.

I say that, and I mean that legally I have no opinion, because the duty is upon you to make that decision, not upon me. I am giving you no hint and I give you no hint, nor from any ruling will you get any hint of any views that I may have [4] or what I may think as to the guilt or innocence of the defendants.

Sometimes the juries look for that. They think they will get a hint from the judge as to how they should decide the case. I say to you, without meaning to be abrupt, you will get no hint from me. That's your job. You have to decide the case yourselves.

Now, sometimes the Court interrogated witnesses and admonished witnesses. You are not to draw from any comments of that kind that the Court was, there again, in any way intending to indicate its views as to your decision in the case. What the Court did in those respects was only in the performance of my duty in supervising the trial of the case and expediting it where possible.

Now, whether or not you believe the witnesses who

have testified in this case and the weight that is to be given to their testimony is something that you yourselves decide. In every case, however, we start out with a presumption or assumption that when a witness comes up and sits in this witness chair that he or she is going to tell the truth. However, that is an assumption or inference that can be rebutted, can be negatived, or it can be changed by other factors such as the manner in which the witness testifies; the demeanor of the witness on the witness stand; whether the witness contradicts himself or herself; whether the witness is [5] contradicted by the testimony of any other witness; the relation that the witness may have to the Government or to the defense.

All these are factors which you may take into account in deciding how much weight you wish to give to the testimony of a witness and whether or not the presumption with which he or she was clothed when he or she sat in the chair in the first instance that he was going to tell the truth has been sustained.

You may disregard the testimony of a witness if you should conclude that the witness has testified falsely in any particular thing, any material way. If it appears that in some material way the witness has lied, then you don't have to accept any of the witness' testimony.

Now, you may find that in this case there are some discrepancies in the testimony of a witness or between the testimony of witnesses. That sometimes happens in a case of any length. This case

has taken over two weeks, and I believe there are, perhaps, sixteen, seventeen, eighteen hundred pages of transcript of testimony, so therefore it is a matter that the case is of some length.

Now, discrepancies are not important unless they are in a material respect. So don't waste your time thinking about some discrepancy that concerns some minor matter that is of very little importance in the case, but only consider a discrepancy if it affects some substantial matter and has a [6] reasonable and close bearing upon the guilt or innocence of the defendants.

Now, the defendants have not taken the witness stand in this case. That is their right and their privilege under our Constitution. Neither the Government nor the Court nor anyone else can draw any unfavorable inferences from the fact that the defendants have not taken the witness stand in the case. Nor can you do so. You must determine the case upon the evidence that has been presented and indulge in no inferences of any kind unfavorable to the defendants because of the fact they did not take the witness stand.

The attorneys argued the case to you. That is their right and their privilege, indeed their duty. If it appears to you that there is any discrepancy between the evidence as stated to be the evidence by the attorneys in their arguments and the evidence as you recall it having been given by the witnesses, to that extent you will disregard the statements made by the attorney and keep in mind and give credence only to the testimony and the

evidence as you recall it having been given by the witnesses themselves.

Now, your should use your good judgment in this case, and, as has been stated, you can also use your common sense. You bring that with you and you can use it, too. And you should resolve the facts of the case, the issues of the case, which is the guilt or innocence of the defendants, according to a [7] calm and cautious judgment, having regard for your own knowledge of the things that human beings ordinarily do or don't do under reasonable, ordinary conditions.

You should remember that the defendants, and each of them, are entitled to any reasonable doubt which you may have. You should also remember, at the same time, that if you have no such doubt the Government is entitled to a verdict.

Now, there has been some mention made of the rules applying to circumstantial evidence by counsel in their arguments in this case. Let me say to you that there are two kinds of evidence that we have in courts. We speak of them as direct evidence and circumstantial evidence.

Of course, direct evidence is the testimony that is directly probative of the offense itself—someone who saw the offense committed, and evidence of that nature, is called direct evidence.

The other kind of evidence is what is commonly called circumstantial evidence, which is proof in the testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime

by a defendant, and which is generally defined as circumstantial evidence.

Now, there is no difference between the two kinds of evidence so far as what is required to prove a case. One kind of evidence is just as good as another. The only requirement is that the evidence, whether it be direct or circumstantial, [8] must produce conviction in your minds beyond a reasonable doubt, and if you are convinced beyond a reasonable doubt it doesn't make any difference whether the evidence is direct or circumstantial in character. I think it may be fairly said that in this case both kinds of evidence are involved. Testimony involving both kinds of evidence is involved.

There is a rule, however, that the courts have followed, and that is when proof of guilt depends wholly upon circumstantial evidence then in order to justify a verdict of guilt in such a case the circumstances must not only be consistent with the guilt of the defendant or defendants but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence.

Now, that rule has been given by judges for a long time. I myself have considerable doubt about it, although I tell you that it is the law, because I think it is just a hifalutin way of saying what I have already said to you, namely, that you can't find a verdict of guilty unless you are convinced of guilt beyond a reasonable doubt; and of course if you can draw two reasonable hypotheses from the same circumstances, of course there must be a reasonable doubt. But nevertheless I give you this

rule because for a long time it seems to have been in the books.

Now, we come to what you are called upon to decide in this case—what the issues are. This case is—the issues [9] of the case are comparatively simple. I don't mean by saying that that they are not important because the issues are important both to the Government and to the defendants. They are important to everyone involved in the case. But they are, in a common sense point of view, comparatively simple.

We have four counts in the indictment in this case. They have been referred to by the counsel and I have referred to them before. Let me just very briefly tell you what is involved in each of the counts in the indictment.

The first count of the indictment charges that on the 27th of August of last year the defendants——

Oh, before I take up the counts of the indictment I should like to again restate to you something I said during the course of the trial, toward the end of the trial:

The Court granted a motion to dismiss the defendant Blau in the case. That left in the case the four defendants who have been remaining as defendants since that time.

That decision of the Court was based upon legal grounds with which the jury is not concerned. That decision does not affect the jury's consideration of the guilt or innocence of the other defendants in any way. It is of no concern to you and it is of

no moment to you. You disregard it. You only consider the guilt or innocence of the four remaining defendants in the case, uninfluenced by the action of the Court, which made its decision upon legal grounds. [10]

Now, going back again to the first count of the indictment, in substance it charges that on the 27th of August of last year the defendants Kremen, Coleman, Steinberg and Rasi, knowing that Thompson had committed an offense in New York, had been convicted of committing an offense, did receive, relief, comfort and assist Thompson in order to hinder and prevent his apprehension and punishment.

Now, that count of the indictment was predicated upon a statute or law of the United States, which, in substance, reads:

"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trials or punishment, is an accessory after the fact."

That is the charge contained in the first count of the indictment. That is the law upon which the charge is predicated.

Now, with reference to that first count of the indictment, let me say to you that you need not examine the facts or the record presented to determine whether or not Robert Thompson committed the crime therein described, because I now tell you and instruct you as a matter of law that the record shows that Thompson was convicted of

the said crime in a United States court, and that judgment was pronounced against him and has become final. Consequently, Thompson did commit the crime of conspiring to teach the overthrow and destruction of the United [11] States Government by force and violence.

The issue for you to determine under the first count of the indictment, therefore, is whether the defendants in the case, or any of them, knew at the time mentioned in the first count that Thompson had committed the aforesaid offiense, and whether they or any of them received, relieved, comforted or assisted Thompson in order to hinder or prevent his apprehension or punishment.

Now, I don't think that the language of the statute or the indictment needs any further embellishment from the Court. The words "received, relieved, comforted and assisted" are such common words that it is obvious that, using your common sense, you must understand them, therefore the Court need not further define them.

Now, the second count of the indictment charges that the same defendants—again leaving out the defendant that has been eliminated from the case—the same defendants, Kremen, Coleman, Steinberg and Rasi, unlawfully and willfully and knowingly conspired with each other, and that the object of such conspiracy was to commit the offense of receiving, relieving, comforting and assisting Robert Thompson in order to hinder and prevent the apprehension and punishment of the said Thompson, while the defendants well knew that said

Thompson had violated certain statutes named, and that pursuant to the conspiracy the defendants committed certain overt acts. [12]

Now, the second count of the indictment charges a different offense than the first count. It charges an offense which is known in the law as a conspiracy. And that count of the indictment, the second count of the indictment, is phrased pursuant to a statute which provides, in substance, that if two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more such persons does any act to effect the objects of the conspiracy, each of such persons shall be punished in the manner provided by law.

Therefore, the offense described in the second count of the indictment is conspiracy or agreement, which is in itself an offense. In a few moments I shall state to you very briefly what the principles are that determine the law as to conspiracy. But I wish to go on now and tell you about the third count of the indictment.

That charges that on the 27th day of August, 1953, the defendants Kremen, Coleman and Rasi, or Ross, with notice and knowledge of a fact that a warrant had been issued for the apprehension of Sid Stein, also known and named herein as Sidney Steinberg, did in Twain Harte harbor and conceal so as to prevent his discovery and arrest the said Sid Stein, also *know* and named herein as Sidney Steinberg, for whose arrest a warrant had been

issued pursuant to law by the United States [13] District Court for the Southern District of New York.

The offense charged in the third count of the indictment is one that is proscribed by another section—described in another section of our laws, and it reads substantially as follows:

"Whoever willfully harbors or conceals any prisoner, after his escape from the Attorney General——"

Oh, I have read the wrong one. Strike that out.

"Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be punished as provided in the law."

Now, with reference to this third count of the indictment, it is not necessary for you to consider any factual matter as to the allegation as to the issuance of the warrant for the arrest of Steinberg, because I now tell you as a matter of law that a warrant for the arrest of Steinberg had been issued; and therefore, the only issue for you to determine under the third count of the indictment is whether the defendants, or any of them, had either notice or knowledge that such a warrant had been issued for Steinberg, and having such notice or knowledge, [14] harbored or concealed Steinberg so as to prevent his discovery and arrest.

Now, the word "harbor" as used in the statute means, I say to you, "care for", or to furnish shelter or lodging or other form of protection. Not in a normal humanitarian spirit or sense, but with the intent to encourage the fugitive in his flight, to further his flight and escape, or to impede or frustrate his capture.

The word "conceal" does not mean that a fugitive has to be kept in some dark or inaccessible place. It means that the fugitive must be clandestinely kept out of sight in any manner at all that will intentionally impede and frustrate the searching authorities.

Either act, harboring or concealing, is an offense under the statute.

The fourth count of the indictment is a conspiracy count, as is the second count, charging the defendants Kremen, Ross and Coleman with conspiracy to harbor Steinberg. And there again, it is again a separate offense, the charge of conspiracy in the fourth count.

Now, the first two counts of the indictment charge the four defendants who are in the courtroom, namely, Ross, Kremen, Coleman and Steinberg, with receiving as accessories after the fact Thompson: and the second count charges the same four defendants with conspiracy to do that. [15]

The third count of the indictment charges the three defendants exclusive of Steinberg with harboring Steinberg: and the fourth count charges those same three defendants with conspiracy to harbor Steinberg.

So you have three of the defendants—Ross, Kremen and Coleman—named as defendants in all four counts of the indictment and the defendant Steinberg named as defendant only in the first two counts of the indictment.

Now, I have to take a few minutes to tell you what the meaning of the law of conspiracy is, because we have two counts of the indictment, the second and fourth counts, that have to do with conspiracy.

I have already read to you the statute on the subject. The agreement, the conspiracy itself is the substantive offense.

To constitute conspiracy it is not necessary that two or more persons should enter into an express agreement for the unlawful venture or scheme, or that they should directly state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated [16] by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before a defendant may be found guilty of the

that a conspiracy was formed, as alleged in the indictment, and that the defendant was an active party thereto.

It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants, or at their direction or with their aid, to effect the object of the conspiracy.

I have not read to you again the overt acts. They were read to you before and I think it is unnecessary to do that now.

Each party must be actuated by an intent to promote the common design. If the persons pursue by their acts the same unlawful object, one performing one act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction, with a view and purpose to further the [17] common design. And if a person, understanding the unlawful character of a transaction, encourages, advises or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance

of the common object, is considered the act and declaration of all the conspirators, and is evidence against each of them.

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy, or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if any of the defendants, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty.

An overt act as charged in the indictment need not be [18] criminal in nature, if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street, or getting into an automobile, or as a man using a telephone, or a person who buys food, or a person who makes a bed or does washing; any act, even though it may be innocent in its character, if it is done by one of the conspirators to effect the object of the conspiracy involved, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act.

It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of these be proved, and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts than those charged may be given in evidence, but proof of one of those charged in the indictment is indispensable.

Now, ladies and gentlemen, in determining the matter of the guilt or innocence of the defendants, the Court suggests to you that you give consideration to and devote your attention to all of the circumstances that have been disclosed by the evidence. There has been testimony here and exhibits presented concerning the events of the day on which the defendants were arrested in the Germany House in Twain Harte on August 27, 1953. Now, in determining the guilt or innocence of these defendants, and each of them, you should consider all [19] of the relative circumstances disclosed by the evidence—both the testimony of the witnesses and the exhibits.

And among these circumstances, by way of illustration only, are such factors as the identity of the defendants, their status and affiliation with one another, their relationships to one another and to Thompson, both prior to and at the time of the occurance of the events of August 27th, and their activities and their method of living together and their course of conduct.

These circumstances are illustrative to you of circumstances that have been disclosed by the evidence, and not tending to be exclusive, and merely

pointed out to you as circumstances as illustrative of the nature of the evidence in the case and of the need on your part to consider all those circumstances, not confined to those which I have cited to you merely by way of illustration.

Now, there has been some testimony that has been excluded in the case at various times, members of the jury. The testimony or the exhibits that have been excluded from the case are not for your consideration in determining the issues that are submitted to you; and you are to draw no inferences of any kind, either favorable or unfavorable to the defendants in the case, from the exclusion of any evidence. You simply wash any evidence that has been excluded from your minds and give your attention only to those matters that have been [20] admitted into evidence and which are before the jury.

Now, there has been some discussion between counsel on the subject of the use of names by persons. I will say to you that it is the law that for any legitimate purpose any person has a right to take any name he wishes to use—he or she wishes to use. And if such name is used for any normal or legitimate purpose, there is no unfavorable inference that may be drawn because a person has used a different name. But the use of different names in this particular case may be taken into account by you if you find from the evidence in the case beyond a reasonable doubt that the taking of these different names was for an unlawful or fraudulent or improper purpose under the law, and

in such event you may take into account in your consideration as to the guilt or innocence of the defendants the use of such names.

Now I think, members of the jury, that I have given you generally what I think may be of help to you in deciding this case. If you can conscientiously do so you are expected to agree upon a verdict. Each of the defendants individually is entitled to the independent judgment of each juror. You will determine the guilt or innocence of each defendant separately. Each defendant is entitled to have his or her fate decided by you independently of each of the other defendants in the case.

You should, when you go into the jury room, be free to consult with one another. And if any of you should be convinced that your view of the case is erroneous, you should not be stubborn and you should not hesitate under those circumstances to abandon your own view. On the other hand, if after a full exchange of ideas you believe your view was right, you should adhere to it.

You may find in this case all of the defendants, Kremen, Ross and Coleman, guilty of all counts of the indictment, or not guilty of all counts of the indictment, or one of them guilty and the other not guilty on the same counts of the indictment. You have complete liberty of action to make any decision you wish in that regard as to each of the defendants separately.

And that is equally true as to the defendant Steinberg, who is only charged in two counts of the indictment. You may find him guilty on both counts,

not guilty on both counts or guilty of one count and not guilty on the other count.

When you retire to the jury room to deliberate you select one of your number as foreman or forelady, as the case may be, and he or she will preside over your deliberations and represent you in the future conduct of the case in this court.

You cannot return a verdict in this case unless all of you have agreed to the verdict. The verdict must be, in a [22] criminal case in Federal court, unanimous. Therefore, you should not leave the jury room to bring in a verdict to the court room unless in the jury room all of you have agreed to the verdict, and when that happens your foreman signs the verdict for you and it becomes the verdict of the jury.

After you have retired to deliberate and have selected your foreman, if you wish to see any of the exhibits in the case you may send for them and the Court will see that they are sent to you.

Now, we have prepared for your use four forms of verdict. They are not intended to indicate in any way what your verdict should be, but merely are forms which you can use. There is a separate verdict as to each defendant. The form of verdict as to the defendant Kremen has four blank lines, and opposite each of the blank lines the number of the count of the indictment: Count 1, Count 2, Count 3 and Count 4. Whatever your decision is as to the defendant Kremen, you will write the word "guilty" or "not guilty" in the blank space provided in the

form, and your foreman will sign that form of verdict.

Similarly, that is true in the case of the defendant Ross and the defendant Coleman. And in the case of the defendant Steinberg there are two blank lines and only Count 1 and Count 2 are referred to, and you will write the words "guilty" or "not guilty" in the two blank lines provided in [23] that case and the foreman will sign that form of verdict for you.

Does counsel have any suggestions?

It may be, members of the jury, that there may be something I might want to add to the instructions or change in the instructions, so I am going to send you out for a few moments with the Bailiff while I determine that fact with counsel.

Now, the case has not been submitted to you as yet. You are still under the admonition not to talk about the case among yourselves, nor to form or express any opinion on it, or let anybody else talk to you about it.

As soon as I determine whether or not there is anything I wish to add to the instructions I will have you brought back again.

Will you take the jury out?

(Thereupon the jury left the court room and the following proceedings were had outside the presence of the jury:)

The Court: Does the Government have any suggestions?

Mr. Schnacke: No, Your Honor.

The Court: Mr. Gladstein?

Mr. Gladstein: Your Honor, I had one or two: I think, if your Honor please, that the instruction that the Court gave concerning the use of names other than one's own, your [24] Honor said to the jury that if the names were used in some abnormal or illegitimate manner or for the purpose of defrauding. I do not think those were issues, and I take exception to the content of the instruction.

The Court: I thought I said generally that a person could use a name for any legitimate purpose and it wasn't against the law to do so.

Mr. Gladstein: You did say that.

The Court: But if it was used for some fraudulent or other purpose, then it could be taken into account.

Mr. Gladstein: You did say that, your Honor, that's right, yes. It seems to me that that is not an accurate statement.

Also your Honor's instruction concerning a reasonable hypothesis. My notes aren't very clear on that, but it seems to me the jury wasn't told—well, I will withdraw that, because I really didn't take notes and I am not sure in my recollection what your Honor left out.

The Court: You mean on circumstantial evidence?

Mr. Gladstein: Yes, your Honor.

The Court: Well, I read that. That is one of the few things I read.

Mr. Leonard: I think the effect of the instruction—my impression is, the effect of the instruction was to tell the jury, it is about the same as the rule

on reasonable [25] doubt, and it is our position these are two separate matters.

The Court: I told them they were two separate matters, and told them that was my instruction although I don't fully agree with it.

Mr. Gladstein: The only other thing, your Honor please, I don't have them listed, but we submitted, your Honor knows, a number of instructions dealing with such matters as harboring, concealing, accessory after the fact, matters of that kind, which I suppose your Honor feels that portion thereof with which your Honor agrees or which your Honor approves has been synthesized in your own instructions.

But I do feel we requested matters of law to be given to the jury which are not comprehended within your Honor's instructions, and they are specifically set forth in our instructions. I don't bear them in mind at the moment. But I do want to take exception to your Honor's failure to give those instructions to the jury, particularly on the subject of what the purpose of harboring and concealing must be.

In other words, by way of illustration, that not every form of assistance to a person who is a fugitive constitutes a violation of the law, and matters of that kind, which were embraced within the instructions which were submitted.

Mr. Leonard: I think, your Honor please, there should be two other matters, for the record, of which we should take [26] note.

I think the record should show our objection to

the instruction that your Honor gave that as a matter of law the jury have no concern with the question of the Thompson conviction. That point was raised on our objection to the introduction of the document and for the record I think we should preserve it at this time, our objection to the instruction, and assign the same reasons that were assigned when that document was offered into evidence.

And I think, your Honor, that toward the conclusion of your instructions when your Honor told the jury it might consider all the circumstances of the case, and by way of illustration your Honor referred to the false identities and prior associations, I think that was getting close to a comment on the evidence, although I know your Honor indicated he didn't intend to, and I am sure your Honor didn't mean to comment on the evidence, but you did summarize by way of illustration.

The Court: I didn't say anything about false identities.

Mr. Leonard: I thought you did.

The Court: I said that the Court might consider the identity of the defendants, their status and affiliations.

Mr. Leonard: It seemed to me, as I heard it, it was pretty close to a comment on the evidence, and perhaps the jury ought to be admonished again in that regard. [27].

The Court: Does that cover the exceptions?

Mr. Gladstein: Yes.

The Court: You may bring the jury back.

(Thereupon the jury returned to the court room and the following proceedings were had:)

The Court: I don't think it is necessary for the jury to go into the jury box. Just stand there.

Members of the jury, the Court has concluded the instructions and is submitting the case to you now. The Bailiff will take you out now. We will arrange for the Bailiff to take you to lunch so that you can have your lunch, and then you can begin your deliberations. You can organize now, if you want to, and elect a foreman, but I think I should arrange for your lunch now.

(Thereupon, at the hour of 12:07 p.m., the jury retired to deliberate upon their verdict.)

(At the hour of 3:04 p.m. the jury returned to the court room and the following proceedings were had:)

The Court: The Court has received a communication from the jury requesting certain testimony, and I have sent word to the jury, through the court officers, that in order to have any testimony read to the jury it would be necessary for the jury to return to the court room and request the [28] testimony be read.

There are several items in this note that the jury sent to the Court: "We would like the following testimony of the auto court owner at Camdenton, Missouri."

Mr. Foreman, do you wish all that testimony read?

The Foreman: We are trying to establish dates,

and we would like to ask if it would be permissible to write the different dates down in this period?

The Court: So you don't want all this testimony read?

The Foreman: Other than the woman who owned the sport shop in Twain Harte. We would like the testimony read about her identifying Mr. Thompson at that time. That is the only part.

The Court: Otherwise, you wish dates?

The Foreman: Dates referred to and also her testimony.

The Court: What is the name of the resort owner?

Mr. Schnacke: Donner.

Mr. Gladstein: That is a Mr. Donner, your Honor.

The Court: The testimony of the sportswear shop?

Mr. Schnacke: That is Hendrickson.

Mr. Gladstein: Mrs. Hendrickson in Twain Harte and a Mr. Donner who is the motor court owner in Missouri.

The Court: At the present time the foreman states that he wants the testimony of the owner of the sports shop in Twain Harte. Will counsel agree that the reporter may [29] read from the transcript of the testimony?

Mr. Gladstein: He may read from the transcript.

Mr. Schnacke: That is agreeable.

The Court: I suggest counsel find the testimony of the witness and give it to the reporter to read.

Mr. Gladstein: While that is being worked out, your Honor, I have only one observation to call to

the attention of the Court: We have no objection to the jury being supplied with whatever dates they desire. The auto court owner from Missouri, Mr. Donner, did not identify Mr. Thompson as having been at his premises.

The Court: The jury didn't ask anything about that.

Mr. Gladstein: I thought I understood that.

The Court: No, they wanted to know certain dates. Is that right?

The Foreman: Yes.

The Court: You put your request in writing so we won't fall into any error, Mr. Foreman, as to just what information you want and if it is in the record the Court will furnish it to you. If it is not in the record the Court will so advise you, then we won't make any mistakes.

May it be stipulated the court reporter may read the testimony of the witness Hendrickson from the written transcript rather than from his notes?

Mr. Gladstein: Yes, your Honor. [30]

(Thereupon, the testimony of the witness Hendrickson was read to the court and jury by the Reporter.)

Mr. Schnacke: Your Honor please, on the second point that they wish there is a very short extract of about eight lines which I think will cover the dates to which the jury has inquired, and it might be best to have those dates read.

The Court: Before you do that I want to be sure we don't get ourselves into error. What has

been read to you by way of testimony is all the testimony you want read?

The Foreman: Yes, sir. We are only interested in the dates in the other.

The Court: In order that we don't have any discussion before the jury or get into any confusion, the jury can retire and you write down on a piece of paper whatever dates it is or whatever you want information on and we will attempt to supply it if we can. I think that will be a safer procedure.

You can take the jury out.

(Thereupon at the hour of 3:25 p.m. the jury retired from the court room.)

Mr. Schnacke: They were asking about the Donner testimony which is the stay at the Camdenton auto court, and as I remember it it was on the 29th and 30th of May, 1953, for two days, and on the 4th and 5th of July. [31]

Mr. Gladstein: I understand that is correct.

The Court: Then if I get a request from the jury we can give them that date.

Mr. Schnacke: That is my understanding.

Mr. Gladstein: That is what I understand.

The Court: All right, if there is a request the Court can give them those dates.

(Thereupon Court recessed to await the verdict of the jury.)

(Thereupon, at the hour of 4:55 p.m. the jury returned to the courtroom.)

The Court: The Foreman of the jury has addressed a note, "We members of the jury would

like to have more instruction as to what constitutes conspiracy under these charges."

Do I understand what you want me to do is to re-give you the instruction which I gave you on conspiracy?

The Foreman: Yes, sir.

The Court: Well, I remember that instruction. In general the instruction which I gave you is on the subject of conspiracy, which is the charge contained in the second and fourth counts of the indictment, as follows:

I read to the jury the substance of the Federal Statute under which the second and fourth counts of the indictment were stated. In substance the statute provides that if two [32] or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of such conspiracy, all of the parties to said conspiracy shall be punished as provided by law.

Now, I further instruct you that the agreement itself, that is, the conspiracy, is the substantive offense. To constitute a conspiracy it is not necessary that two or more persons should enter into an express agreement for the unlawful venture or scheme or that they should directly state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, positively or tacitly come to

a mutual understanding to accomplish a common and unlawful design.

In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before a defendant may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed as alleged in the indictment and that the defendant or defendants [33] was an active party or parties thereto.

It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants, or at their direction, or with their aid, to effect the object of the conspiracy.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction, with a view and purpose to further the common design.

And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its procecution, he becomes a conspirator.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators, and is evidence against each of them. [34]

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon *the* establish the conspiracy, or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men and women that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants or any of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants or some of them, were parties to the conspiracy as charged, you must make a deduction and find accordingly.

It is not necessary that it be shown that any

person concerned in the alleged conspiracy profited by the things which he or she did, but if any of the defendants, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty.

An overt act need not be criminal in nature, if considered separately and apart from the conspiracy; it may be as [35] innocent as the act of a man walking across the street, or driving an automobile, or using a telephone, buying food, making a bed, washing clothes. But if, during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act.

It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of these be proved, and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts than those charged may be given in evidence, but proof of one of those charged in the indictment is indispensable.

I believe, ladies and gentlemen, I have substantially accurately repeated to you the instructions I gave you on the general subject of conspiracy as charged in the second and fourth counts of the indictment. Does that cover what you had in mind?

The Foreman: Yes, Your Honor.

The Court: All right, the jury may retire.

(Thereupon, at the hour of 5:05 p.m. the jury retired to deliberate further upon their verdict.)

The Court: I believe, counsel, I accurately recovered [36] the conspiracy instruction because that was the only part of my charge that I actually read, so I think it is a good statement of what I real to the jury.

(Thereupon, at the hour of 9:05 p.m., the jury returned to the courtroom and the following proceedings were had:)

The Court: Members of the jury, have you agreed on all the counts of the indictment?

The Foreman: No, sir.

The Court: Now, I have a question to ask you, and I will ask you to listen to it carefully so that your response will not, as I said before, get us into any error or mistake.

Has the jury come to any conclusion as to any of the counts of the indictment?

The Foreman: Yes, sir, we have.

The Court: And you have not come to a conclusion as to some counts of the indictment?

The Foreman: That is right, sir.

The Court: Now, do you believe, Mr. Foreman, that the state of your discussions is such that further discussion would enable you to come to agreement as to the matters that you haven't yet come to an agreement upon?

The Foreman: We don't believe so, sir.

The Court: Well, under those circumstances the

Court would like to give you some further assistance by way of [37] instructions in the case. It sometimes happens that even in cases where there is only one count of the indictment it is necessary for the Court to give further legal instructions to a jury, and sometimes when there is more than one count and more than one defendant it becomes equally proper for the Court to give further advice and instructions to the jury.

Now, while the verdict of the jury in every criminal case should represent the opinion of each individual juror, it does not follow by any means that opinions may not be changed by conference in the jury room.

I say that to you because the object of the jury system is to secure unanimity of view by members of the jury and from arguments among the jurors themselves, and for that reason every juror should listen with a degree of deference to the arguments of the other jurors and to a distrust of his or her own judgment if he finds a large majority of the jurors take a different view of the case from that he or she takes.

Accordingly, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of the fellow jurors, nevertheless each of you should examine the issues submitted with an open mind and with deference to the opinions of each other.

It is in a sense your duty to decide the case, and the [38] whole case, if you can conscientiously do so, and to that end you should listen to each

other's arguments with a disposition to be convinced. If a much large number of jurors are for conviction, a dissenting juror should consider whether his or her doubt is a reasonable doubt, if it made another impression in the mind of a juror equally intelligent and equally honest.

On the other hand, if the majority of the jury are for acquittal, the minority could ask themselves as to the correctness of their judgment.

I am not suggesting in making this observation that a juror should change his or her opinion solely because a large majority holds a contrary view, but only that such a juror should, under such circumstances, re-examine and review his or her own judgment under such circumstances.

I wish you to go back to the jury room and deliberate further, and if, in view of this advice which I have given you, you still are unable to agree as to some counts of the indictment you may return a verdict as to the counts of the indictment to which you have been able to come to an agreement, and as to the others you may indicate your failure to agree, as to them. But I suggest to you that further consideration of the case, in view of—for some further period, in view of the advice I have given you, might possibly lead to a decision on the whole case.

So I will ask the members of the jury if you will be good enough to retire for further consideration.

(Thereupon, at the hour of 9:10 p.m., the jury retired to deliberate further upon their verdict.) [40]

[Endorsed]: Filed June 10, 1954.

[Endorsed]: No. 14,359. United States Court of Appeals for the Ninth Circuit. Shirley Kremen, Carl Ross, Samuel Irving Coleman, and Sidney Steinberg, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed: July 14, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14359

SHIRLEY KREMEN, et al., Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Come now the appellants above-named and pursuant to the rules in such cases made and provided hereby state the points upon which they intend to rely in connection with the appeal in the above-entitled matter.

I.

The indictment and each count thereof do not

state facts sufficient to constitute an offense against the United States.

II.

The evidence against the defendants and each of them was obtained as a result of an unlawful search and seizure and the trial court erred in denying appellants' motions to suppress it.

III.

The evidence is insufficient to support the verdicts or any of them against the appellants or any of them on any of the counts of the indictment.

IV.

The trial court erred in denying appellants' motions for judgment of acquittal.

V.

The trial court erred in refusing to charge the jury as requested by appellants.

VI.

The trial court erred in charging the jury as it did.

VII.

The trial court erred in denying appellants' motions for a mistrial.

GLADSTEIN, ANDERSEN & LEONARD,
RICHARD GLADSTEIN,
NORMAN LEONARD,
/s/ By NORMAN LEONARD,
Attorneys for Appellants

[Endorsed]: Filed July 19, 1954. Paul P. O'Brien, Clerk.

[fol. 942] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARGUMENT AND SUBMISSION—September 12, 1955
(omitted in printing)

[fol. 943] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT—January 20, 1956

Ordered that the typewritten opinion of LEMMON, Circuit Judge, concurring opinion of HEALY, Circuit Judge, and dissenting opinion of DENMAN, Chief Judge, this day rendered, be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion and concurring opinion rendered.

[fol. 944] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,359

SHIRLEY KREMEN, CARL DOSS, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG, Appellants

vs.

UNITED STATES OF AMERICA, Appellee

Appeals from the United States District Court for the Northern District of California, Southern Division

OPINION—January 20, 1956

Before DENMAN, Chief Judge, and HEALY and LEMMON, Circuit Judges

LEMMON, Circuit Judge:

A depressing tale of lies, disguises, and aliases resorted to by a group of seasoned subversives, referred to by their own attorneys as "these Communists" is unfolded by the record in this case.

It is a tale of how a handful of Reds sought to shield a convicted member of their group from condign punishment.

It is a tale of the devious practices to which they resorted in their almost successful efforts to cheat the law.

It is, finally, a tale of how their deceptions and their subterfuges were frustrated at last by the patient labors of Federal "Cossacks", as officers of the law are sometimes contemptuously called by the Reds.

With regard to the means used by "the Communists" to help a pair of their leaders to thwart justice, it is naive indeed to expect to find them hiding in alleys, skulking in [fol. 945] twilight corners, turning up their coat collars, or pulling their hats down over their eyes.

No; the hard-core members are far too adroit and well-instructed for such amateurish cloak-and-dagger technique. They select a quiet village, rent a cabin, and then, wearing shorts, play ping-pong in their front yard. Or they add touching domestic notes, hanging up the family wash or buying groceries at the village store.

1. *The Indictment*

The indictment was in four counts. The first count alleged that on October 14, 1949, Robert G. Thompson was convicted in New York for conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government by force and violence in violation of Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act. (18 USCA, 1940 ed., Secs. 10, 11, 13; 18 USCA Sec. 2385, 1948 revision)

It was further averred that on August 27, 1953, near Twain Harte, Tuolumne County, California, the appellants,[1] knowing that Thompson had been convicted of the above offense, "did receive, relieve, comfort and assist" him "in order to hinder and prevent his apprehension and

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[1] Patricia Julia Blau was also named as a defendant in the indictment. Since the District Court granted a motion to dismiss her from the case, she does not figure in this appeal.

punishment". This count was brought under 18 USCA Sec. 3, infra.

The second count charged that the appellants *conspired* to commit the offense charged in Count 1, and seven overt acts were set forth. 18 USCA Sec. 371.

The third count alleged that on August 27, 1953, the appellants Kremen, Coleman, and Rasi, also known as Ross, knowing that a warrant had been issued for the apprehension of the appellant Sid Stein, also known as Sidney Steinberg, harbored and concealed him so as to prevent his [fol. 946] discovery and arrest, a warrant for his arrest having been issued by the United States District Court for the Southern District of New York. 18 USCA 1071.

The fourth count stated that the three appellants named in the third count conspired with each other, with Thompson, and with divers other persons to harbor and conceal Steinberg "so as to prevent his discovery and arrest", while those three appellants knew that a warrant for the arrest of Steinberg, under the name of Sid Stein, had been issued by the above-mentioned Court in New York on June 20, 1951. Thompson was named in this fourth count as a "co-conspirator but not as a defendant". Six overt acts were alleged. 18 USCA Sec. 371.

2. *Statement of the Case*

Motions to dismiss, for discovery and inspection, for a bill of particulars, for the issuance of pre-trial subpoenas, and for a return of property seized in the raid and its suppression as evidence were made by the appellants and were denied. The District Court did, however, rule that the appellants might, on demand, have a copy of the summarized list of items seized. Such a copy was furnished them, *infra*.

After a trial starting on April 12, 1954, and lasting two weeks, during which the appellants offered no evidence, each appellant was found guilty on all counts in which he or she was charged. Judgments of imprisonment were pronounced upon all of the appellants, from which judgments the present appeals were taken.

3. *The Appellants' Attack Upon the Judgments of Conviction*

The following errors are asserted to have been committed by the court below, in the order in which they are discussed in the six subdivisions of the appellants' opening brief, and in the order in which they will be considered herein:

1. Sections 3 and 371 of 18 USCA were construed and applied under the first and second counts of the indictment in a manner violative of the due process guarantees of the Fifth Amendment.

2. The search and seizure were unlawful and it was error to deny the motions to suppress.

[fol. 947] 3. The evidence is insufficient to sustain the conviction against any of the appellants.

4. The first and second counts of the indictment do not state any offense against the United States since they do not charge Thompson with a violation of the Smith Act.

5. The trial court erred in instructing the jury.

6. The trial court erred in failing to instruct the jury as requested by the appellants.

4. *The Applicable Statutes*

As we have noted in our summary of the indictment, the charges are based upon three sections of 18 USCA, as follows:

> "*Sec. 3. Accessory after the fact*
>
> "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.
>
> "Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

"*Sec. 371. Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

[fol. 948] *Sec. 1071. Concealing person from arrest*

"Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined not more than $1,000 or imprisoned not more than six months, or both."

5. *Testimony in Connection With the Motion to Suppress Evidence*

Because of the appellants' contention that there was insufficient evidence to justify the arrests, the seizures, or the subsequent verdicts of guilty, we are attempting to give in the following two sections somewhat full summaries of the relevant testimony.

William H. Whelan, an agent of the Federal Bureau of Investigation, was in charge of the fifteen agents and the matron who participated in the arrests that took place at a certain house and its environs near the village of Twain Harte, on August 27, 1953, at 1:05 p. m.

The house, referred to in the record as a "cabin", was a two-story structure with a small porch on one side of it. It was on a "secondary" road, with a driveway leading from the road to the cabin itself.

The arresting party arrived in six automobiles, which drove up the roadway to the front of the house. Thompson and Steinberg were standing out in the yard. Whelan announced that he and his party were agents of the F.B.I., and that they were there to arrest them. He called upon the pair to surrender.

Thompson and Steinberg put their hands up. Agent Whelan directed them to go over to two trees in the yard, and ordered some other agents to take charge of them and search them. The two prisoners were handcuffed and were permitted to sit on the ground beside one of the trees.

Whelan testified that at that time he "advised them (Thompson and Steinberg) that they were being arrested because of the warrants that were outstanding for the arrest [fol. 949] of both of them in the Southern District of New York". He then directed the other agents to go into the house and he followed them inside. There the three persons were ordered to come outside. The men were searched, handcuffed, and seated. The young woman was searched with the help of the matron, and then was seated on a chair by the porch. Elsewhere the record indicates that Mrs. Kremen was not handcuffed.

The three prisoners who had been brought out of the house were "advised that they were being arrested by virtue of the fact that they were harboring" the two persons for whom the officers "had warrants outstanding". They were all handcuffed and searched.

The three prisoners taken from inside the house were the appellants Ross, Kremen, and Coleman. Steinberg, who was arrested outside the house, is the fourth appellant. Thompson, it will be remembered, was not made a defendant in the instant case.

The five prisoners were fingerprinted and photographed on the spot. Then they were told that they would be taken in without any more delay than was necessary, to be arraigned. In view of the fact that they would be transported to San Francisco, they were given the opportunity to pick up clothing or other articles that they might wish to take along on the trip. Each was taken to San Francisco in a separate automobile and all were arraigned in that city later the same evening.

Back in Twain Harte, the search "was completed that afternoon". Whelan had given orders that, with the exception of items of furniture, all personal property was to be taken.[2]

It was conceded that no search warrant was ever obtained. The officers were not looking for anything in particular—they were searching for "weapons, . . . contraband or anything that would be a fruit of the crime or a part of the crime". A document of 25 pages, entitled "Personal Property and Papers", which was a list of articles seized at the cabin, was introduced in evidence by the appellants. The [fol. 950] list was prepared under Whelan's supervision. Whelan testified that he made the decision to arrest the five persons at the cabin. This decision, made "in consultation", was that, "if a known fugitive is there, if there are others there that it can be said could be a part of the harboring process, then the others should be taken too."

The agent's weapons were drawn and directed at the appellants at the time of the arrest. The appellants "were asked for permission to allow the search to be made", but "they said nothing".

The appellants were wearing "play clothes" or "sun clothes", and there was some laundry on the line. "The whole house looked like it was lived in. There were two cars there, . . . There was food in the house."

Thompson and the appellant Steinberg were "recognized", and Agent Whelan had them "under surveillance" while they were in the yard talking together.

Whelan's first information that Kremen and her companions were at those premises was received on the afternoon preceding the raid, but he "knew it for sure that morning", within an hour or so before the arrest—at least so far as Kremen, Thompson, and Steinberg were concerned.

On cross-examination, the attorney for the appellee brought out the fact that F.B.I. agents had gone to the vicinity of the cabin "some time prior to the arrest", and that on the day of the raid "the first group were in the vi-

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[2] Later, at the trial, Roy L. Erickson, a special agent for the F.B.I., testified that "Everything was removed except that which the realtor handling the house identified as the property belonging to him."

cinity of the cabin around 6:00 a. m." Whelan himself appeared at the scene "just at thetime of the arrest", but "was in contact with them by radio" from 6 a. m. until the time at which he himself appeared. The other agents reported to him "to identify persons as they came out or went in and to name them if they could."

Mrs. Thelma L. Germany testified that she and her husband owned the cabin in question and rented it that summer through "Jimmy" Morrow, a real estate broker.

Morrow, next called as a witness, stated that a "Mrs. Lee Kaplan" had approached him, expressing a desire to rent a cabin "that was secluded and quiet because her brother was ill with nerves and she wanted to be where they would be [fol. 951] by themselves." "Mrs. Kaplan" rented the cabin in question and paid the rental monthly in advance. Morrow identified the appellant Kremen as the person who had rented the cabin. The rent was to start on June 26, 1953.

In connection with the motion to return seized property, *supra*, Agent Whelan testified that "the automobiles"[3] were returned. "They had a registered name on it and they were returned. *We never found out to this day who wants any of the rest of this property.*" The appellee's attorney stated in open court that "The automobiles were registered to people other than these defendants and we returned them."

6. *The Testimony at the Trial*

(a) *The Reconnaissance*

Special Agent Erickson testified that on the day of the arrests he arrived in the area of the cabin at 5 a. m. He and four other agents hid behind boulders or trees on a hill above the cabin. He was in the area above the road and sometimes on the road itself. Erickson was able to observe an outhouse, *infra*, at all times. He was about 100

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[3] Testimony at the trial showed that there were two automobiles near the cabin, in the parking area. One was a light green Chevrolet and the other a 1950 bronze-colored Ford.

feet from the cabin and remained at his station until about 1:04 p. m.

At 9:30 a. m. a man emerged from the entrance of the cabin. The witness saw this man later in the day. The following morning, the man identified himself to Erickson in Alcatraz Penitentiary as Robert Thompson. Erickson also identified Thompson from colored and black-and-white photographs, hereinafter sometimes referred to as "Exhibit 2" and "Exhibit 3", respectively.

Thompson came out of the cabin with a fly fishing rod and practiced casting for about ten minutes. He then laid the rod on a small table in the yard and returned to the cabin.

At about 9:45 a. m. a woman came out of the cabin and sat in an armchair near the entrance. She appeared to be writing or drawing. Erickson identified the woman as the appellant Kremen. She sat in the chair for about 15 min-
[fol. 952] utes and then returned to the cabin.

While Mrs. Kremen was sitting in the chair, a man dressed only in a pair of brown trousers came out of the cabin. He sat on the ground off of the lowest terrace right by the entrance from which he and the other two had emerged. He remained there for a few minutes and went back in at about the same time that Mrs. Kremen re-entered the cabin. The witness identified that man as the appellant Carl Ross.

Mrs. Kremen re-emerged at about a quarter past ten, carrying what was apparently washed clothing, which she hung on a line stretched to the outhouse from the corner of the cabin nearest to the entrance. She immediately returned to the cabin. The clothing was a man's, and there was "some type of a towel."

At about 10:30 another man came out of the cabin, walked around the yard briefly, and returned. He was dressed in only a pair of yellow swimming trunks or shorts. He was identified by Erickson as the appellant Coleman.

All the four above-mentioned individuals kept walking in and out of the cabin several times. "I did not keep an accurate record of their exits and entrances."

At about noon, a fifth person came out of the cabin. He too was dressed only in a pair of trousers. Erickson identified that man as the appellant Steinberg. The latter pulled

a chair up to the table and sat there, apparently writing or drawing, Erickson testified. After 15 or 20 minutes, Steinberg got up and went back into the house.

At about five minutes after 1 p. m., Thompson and Steinberg were together in the yard. Immediately before that time, all five occupants of the cabin had been sitting in the yard around the table. They appeared to be talking.

Just before 1:05, the other three returned to the house.

At about 12:45, Erickson had received certain instructions from his superior. Pursuant to those instructions he had been relaying the information that he and the other four agents were "observing" to an agent in charge of the operation. Those instructions were passed along by means of a two-way radio, or "handie-talkie".

[fol. 953] "We had been observing the people through binoculars and relaying the details as we observed them," Erickson testified. "About 12:30 we relayed the information that, to our satisfaction, two of the . . . people . . . were . . . fugitives . . ."

"About 12:45 we received instructions to stand by, not to move, but to be prepared to assist approaching party, which was approaching by automobile We were told that there would be an arrest effected, that we would have to take the two who were there that we were satisfied were fugitives in our minds. We were told that we should also be prepared and that we would effect an arrest of all the parties there. . . ."

When the automobiles were seen coming into the entrance driveway, the officers were instructed to leave their cover positions on the upper road and on the wooded hillside and move down to the cleared area "and assist in effecting the arrest of the people of the cabin."

The F.B.I. converged upon the cabin at 1:04 p. m.

(b) *The Attack*

When he observed the F.B.I. automobiles coming up the driveway, Agent Erickson dropped his handi-talki and came down the wooded hillside to the parking area.

When the first car arrived, the agent in charge jumped out and "issued the command to everyone present that we were agents of the F.B.I. and that those on the premises

were under arrest." The three appellants who were inside —Kremen, Ross, and Coleman—"were removed to the outside" to join Thompson and the appellant Steinberg.

Individual agents "assumed charge of the prisoners independently," according to Erickson. He personally took charge of Ross, searching and handcuffing him.

When all of the five persons had thus submitted to arrest, the agent in charge announced that there were warrants for Thompson and Steinberg, and that the officers would have to hold the others on charges of harboring.

One of the documents taken from the appellant Ross has the cryptic flavor of which American Communists are so fond:

[fol.954] "8/24

"Dear Jim:

"Enclosed is note to my Betty. In open envelope is some material which (I?) have written. If you care to read and comment, you are welcome. Please seal before you send off.

"The person on this end of arrangement is being instructed to break off with your lady until he makes certain other arrangements. As previously agreed, contact from your end to be with S, with whom we are in contact. S will explain further and make necessary further arrangements.

"Regards,

"Jess."

Erickson made a thorough search of the house, which gave plain evidence of having been lived in. There was food on the two stoves, on the cabinet above the sink, in the refrigerator. There were two typewriters, a radio and a television set. Clothes were on the floor. There were brief cases and boxes filled with documents of all kinds. There also were papers in the two automobiles.

After reporting the results of his search to his superior officer, Agent Erickson was told to take the material back to San Francisco. The first search through the material was made at the house. He placed the boxes, suitcases, and the material from the two automobiles in a car that was

provided for him, and went back to San Francisco with them, for a more detailed study. The appellants emphasize this taking for further study. There was nothing unlawful in this.

Before Erickson departed, the special agent in charge asked the appellants whether any of them would identify any of the material that was theirs. They all stood mute. The agent pointed out to them that up until that moment it was their privilege to say nothing. He asked them again whether they would identify anything there, or specify "anything they wanted us to take care of". The appellants remained mute. At no time did any of them tell him what was theirs. They now can hardly clamor for the return of property to which they laid no claim when they had ample opportunity to do so.

[fol. 955] Agent Erickson identified a great mass of material taken in the raid. On cross-examination, he testified that while the officers were satisfied, from their observations through binoculars and their examinations of photographs, that two of the occupants of the cabin were fugitives, one of the agents, Joseph McCann, had previously seen the pair in person. He was sure that this was true as to Steinberg, and believed that it applied also to the other. McCann himself later testified that he had known Steinberg since November, 1950, and that he had "observed" Thompson on "numerous occasions" in New York.

Agent McCann, stationed in New York, testified that when he first saw Steinberg in November, 1950, Steinberg weighed about 165 pounds, with "a full face and a heavy build." His hair was long and black. He was about five feet six inches in height, and had a light and sallow complexion. When he saw him on the day of the raid, Steinberg weighed about 125 or 130 pounds, his hair was cut short, he was much thinner in face and body, and he had grown a mustache.

When Agent McCann "observed" Thompson in New York in 1949 and 1950, the latter was aboue five feet ten inches in height, weighed about 180 or 190 pounds, had *long brown* hair, and had a fairly stocky build. On the day of the raid, Thompson weighed 210 or 220 pounds, his hair was *red*—apparently dyed—and was cut *short*. He wore a *light strawberry blond mustache*. His eyebrows were

strawberry blond also. He was very stocky in appearance, and "had a very large stomach".

A wallet was pointed out by Steinberg as belonging to him, McCann said. It contained a California Citizens Angling license, three business cards, a Social Security card, and six rent receipts. All these documents contained the name "Josh Newberg" or "Joshua Newberg". McCann testified that in his search of Steinberg's person and wallet *he found no material bearing the name "Sidney Steinberg"*. Special Agent Erickson had previously identified a Resident Citizen Fishing License, a Social Security card, and five business cards as having been found in the cabin. They likewise bore the name "Josh Newberg" or "Joshua Newberg".

Agent McCann testified that on June 20, 1951, he had a warrant of arrest to serve on Steinberg; that he first at- [fol. 956] tempted to serve it on that day, at Steinberg's residence; that he was not able to serve the warrant; and that Steinberg "had not been seen" by McCann since that time, until the encounter at Twain Harte.

Glenn A. Harter, a special agent of the F.B.I., stationed at San Francisco, said that he examined the contents of Mrs. Kremen's purse at the time of the raid. Among those contents were a library card in the name of Lee Kaplan, another library card in the name of Richard Kaplan, a California resident citizen's angling license in the name of Lee Kaplan, a free campfire permit in the name of Mrs. Lee Kaplan, a Social Security card in the name of Lee Kaplan, a California Motor Vehicle Operator's License in the name of Lee Lefko Kaplan, a Pacific Gas & Electric Company bill issued to R. Kaplan; a San Jose Water Works bill bearing the name Richard R. Kaplan; and "a document saying that 'this is your invoice' to . . . Mr. Richard Kaplan . . ." Agent Harter testified the Kremen material that he examined did not reflect the name of Shirley Kremen or Mrs. Irving Kremen.

Special Agent Joseph T. Daly testified that he was at the cabin on the day of the raid and again on September 2, 1953. On the latter date, he examined ten garbage cans in a garbage container inside of the outhouse, dusting them for fingerprints. He placed scotch tape over the "latent" fingerprints that he found, and sent the cans that contained

fingerprints to Agent Clark in San Francisco. He identified ten Budweiser beer cans as being in the garbage cans to which he referred.

Senior Plant Quarantine Inspector Henry James Warren, of the California Department of Agriculture, stationed at Dorris, California, produced a page from his records showing that an automobile bearing the Missouri license number C-54-274, had entered the State of California at Dorris on August 20, 1953.

Frank J. Smith, special agent for the F.B.I. at New York, said that he had known Thompson from 1949 to the time of the trial, and that the latter's appearance on August 27, 1953, when Smith arrested him, was "not at all" the way he looked four years before. In 1949 Thompson had dark brown hair, which he wore much longer than at the time of his arrest. When picked up at Twain Harte, at which [fol. 957] time Thompson's picture was taken, he had a "crew cut", his hair was dyed red, he wore a reddish mustache, and his eyebrows were red. His complexion was "a brown".

"When I knew him in the past," Agent Smith continued, "he had an apparently sallow complexion. He wasn't the color he was at the time we saw him.

"He weighted over 41 pounds heavier on August 27, 1953, than he had when I saw him prior to that, which was about May 1st, 1951. He had a definite stomach, quite a large stomach, which he didn't have before. He was a husky built fellow, but he was quite fat in this picture here."

Between the time that he first saw Thompson and May, 1951, Smith testified that he "must have seen Thompson several hundred times". He saw Thompson at the Communist Party headquarters, and at about the time of the trial in New York.

At first Thompson wouldn't say anything to him, Smith testified. When fingerprinted, Thompson denied his identity, but would not "talk about who he was". In a coat that belonged to a suit that Thompson admitted was his, there was found a certificate of birth stating that "John Francis Brennan" was born in New York on April 9, 1909.

Another exhibit was a book containing a $100 initiation stamp and certifying that "Brennan" had been granted membership in the International Association of Bridge,

Structural and Ornamental Iron Workers, affiliated with the American Federation of Labor.

Smith also identified a wallet found in the khaki trousers that Thompson was wearing. A sheaf of papers found inside the wallet was also introduced in evidence. These papers bore the name of "John Brennan" or that of "Linda Corsia Brennan." Smith testified that "there was nothing in his wallet or on his person with the name of Robert G. Thompson at all."

Later, in San Francisco, Thompson admitted to Smith that the wallet and the papers in it were his. He finally said to Smith, "Well I guess you know who I am," and signed a "listing" of the money, the wallet, and a penknife that had been taken from him. He signed as "Robert Thompson".

[fol. 958] Albert B. Ground, a fingerprint examiner for the F.B.I., with headquarters in Washington, was the next witness. He testified that he had examined "approximately 5,000,000" of the 130,000,000 fingerprints in the F.B.I. files. He said that he had examined the ten Budweiser beer cans already referred to, and had found thereon the fingerprints of each of the four appellants, as well as that of the alleged co-conspirator Thompson.

John Lautner, a consultant with the Department of Justice, testified that for twenty years prior to January, 1950, except for the time he was in the Army, he had been employed as a functionary of the Communist Party. When the appellant's attorney sought to inquire as to Lautner's specific function in the Party, counsel for the appellants objected that there was "no foundation". The answer of the District Judge was so apposite to many other similar objections by defense counsel that it bears quoting here:

> "*. . . . counsel can't put in all the evidence in one instant of time.*"

Lautner had been head of the New York State Review Commission, security officer of the New York State Organization, and a member of the National Review Commission, all of the Communist Party. He testified that he was acquainted with the appellants, Ross, Coleman, and "Stein" (Steinberg).

Lautner knew Steinberg from 1948 up to the time that the former left the Party, on January 17, 1950. Steinberg's New York office was at the Communist Party headquarters, in the same building where Lautner himself had had his offices.

Thompson had his headquarters in the "national office" of the Communist Party from about 1944 to the time that Lautner left the Party.

Coleman had his offices there from May, 1947, up to the summer of 1949, when Lautner himself acquired an office in the building. He saw Coleman in the presence of Thompson many times, from the summer of 1947 up to the end of 1949, at the state headquarters of the Party. He also saw them at the Party's state convention, at Webster Hall, New York.

[fol. 959] The witness said that he had seen Steinberg and Ross in the presence of Thompson, and that he had seen Steinberg in the presence of Ross at the 1948 national convention of the Party. Coleman was present at the state convention. Thompson was present at both conventions.

In connection with his duties in the Communist Party, Lautner had occasion to work with Coleman, Steinberg, and Thompson.

Thompson, as state chairman of the Communist Party, was Lautner's superior in the New York State organization, and also as member of the National Committee Thompson was his superior officer. This was their status from 1945 to December, 1950.

Lautner and the appellant Coleman were both members of the New York State Organization Commission, Coleman being a member of the educational department and head of the review commission. This party relationship of the two men continued from May, 1947, to about the middle of 1949.

Burnett Britton, another F.B.I. special agent, testified that he visited the area of the Twain Harte cabin at 2:35 p. m. on August 26, 1953—the day before the raid. His car came to about five yards of the cabin and stopped. He saw Mrs. Kremen standing at the door, while two men, whom he identified as Coleman and Thompson, were playing Ping-pong at a table in the parking area south of the cabin. Thompson was again described as having "strawberry blond" hair.

Britton said that he noticed a light-green Chevrolet coupe in the parking area. Later that day, at 4:15 p. m., he saw Mrs. Kremen driving the same automobile "extremely slowly" in the main thoroughfare of Sonora, California, which is about fourteen miles from the village of Twain Harte.

At midnight of the same day, Britton again visited the cabin premises, and again at 3 a. m., the following day, August 27, and, finally, with the raiding party at 1:05 p. m. At that final visit, he observed two automobiles at the cabin, one of them being the 1950 green Chevrolet coupe.

On cross-examination, Britton stated that on his visit to the cabin premises in the afternoon of August 26, the car in which he was riding was being driven by Robert Summers, an employee of the Pacific Gas & Electric Com-[fol. 960] pany, whom Agent Britton had picked up at Sonora three-quarters of an hour before. The automobile stopped at the entrance of the house for about three minutes. Britton remained in the car, but Summers approached Mrs. Kremen. After three minutes Summers returned to the car, and the two men drove off.

Woodrow Walton, a salesman for a Hudson automobile agency at St. Louis, Missouri, testified that he sold a Hudson to a man whom he identified as Samuel Coleman, one of the appellants, on June 5, 1953. Coleman traded in an Olds automobile, signing the necessary papers with the name "William B. Gordon". Coleman kept the license number of his old car and used it on his new Hudson, which is in accordance with Missouri practice. The license number was C54274.

Walter C. Donner, of Camdenton, Missouri, owner and operator of a motel and cottages, identified Coleman as a man who stayed at one of his cottages for two days during the Memorial Day weekend in 1953. Coleman was accompanied by one man and two women. At this juncture counsel for the appellants again objected and the Court, as we have noticed before, remarked, "He has to start somewhere." Counsel for the appellee withdrew his question about the gender of the party, but a moment later developed the information that one of the persons with Coleman was a man, and that there were three persons with him

altogether. Donner testified that he arranged for a boat for Coleman, who returned on July 4 and 5 with his same party and took a cabin there again for two days.

Odie E. Meyers, operator of "a fishing dock or boat resort" at Camdenton, testified that a man whom he identified as Coleman accompanied by a "lady" came to the Meyers dock during the Memorial Day weekend and made reservations for two boats for the July 4 holiday.

During the July 4 holiday four persons were in the Coleman party. Coleman used the name "Gordon". The man with him had hair with a "grayish reddish cast". Meyers identified the two photographs of Thompson as being pictures of the man he saw with Coleman at the boat dock. Coleman and Thompson were together at the boat dock during the three days that the party was there.

[fol. 961] Some time after the visits of the Coleman party, some F.B.I. agents asked for the boat resort's registrations "for that particular day", or the July 4 holidays. The Government men came back and forth to the dock on as many as ten occasions, each time bringing photographs that Meyers and his wife were asked to identify as being persons who had been there.

The first time that Thompson's picture was in a group photograph that was shown to Meyers and his wife, they "selected it", Meyers testified. The couple picked out "only two photographs altogether"—Coleman's and Thompson's. The first time the officers visited the fishing dock, Mr. and Mrs. Meyers were shown a photograph of "Gordon" (Coleman), and "the next time they brought back those photographs, why, he had apparently been apprehended and the photo was in cuffs." During the various visits, the officers showed the couple about four or five different photographs of Thompson and they "picked (him) out each time". Defense counsel himself brought out, on cross-examination, that Meyers "did not know before (he) got on the witness stand" that he was going to be asked to identify Exhibits 2 and 3.

Harold G. Anderson, a merchant of Bigfork, Montana, with authority to issue Montana fishing licenses, identified Exhibits 2 and 3 as being photographs of a man that represented himself as being "J. F. Brennan" and to whom a fishing license was issued, on August 10, 1953. A person

giving the name of "Linda Brennan" was present at the time.

E. M. Spencer, owner of some cabins near Polson, Montana, about thirty miles from Bigfork, identified Exhibits 2 and 3—the Thompson photographs—as being photographs of "J. F. Brennan", a "heavy-set man" with "pink colored hair", who stopped to fish at one of Spencer's cabins for the week commencing August 10, 1953. "Brennan" was accompanied by the appellant Coleman and some other persons. The party arrived at Spencer's property in a light blue Hudson automobile bearing a Missouri license. Spencer's record of the transaction showed "Brennan's" as being St. Louis.

Dr. Isaac Rosenstein, of Brooklyn, New York, said on the stand that Coleman in 1949 occupied one of Dr. Rosenstein's apartments on East Broadway in New York. So far as the doctor knew, Coleman still occupied the apart-[fol. 962] ment, together with Mrs. Coleman and their two children, although the witness had not seen Coleman himself on the premises for "several years" prior to November, 1953.

Mrs. Audrey Hanson, of Minneapolis, Minnesota, said that the appellant Ross, Mrs. Ross, and their daughter, had resided next door to her since about 1946, but that in the latter part of 1950 Ross "had moved away", and she had not seen him until "he was captured in California" in the fall of 1953.

James Morrow, the Twain Harte real estate broker that, as we have seen, was a witness at the hearing of the motion to suppress evidence, testified at greater length at the trial itself. He went into some detail concerning the lies that the appellant Kremen told him regarding her reasons for wanting to rent the cabin in question. He said that Mrs. Kremen, who represented herself to him as being "Mrs. Lee Kaplan", stated that her "brother" was "sick with nerves", that he was a "musician", and that she liked the cabin because "there was a stream there and it was very quiet".

The appellant Kremen's story to Morrow was false, from beginning to end. She used an assumed name. She was not renting the cabin for a sick brother, who was a musician. She did want "a spot where it would be quiet

and rather secluded". She did not want it, however, for a nervous brother, but for a brace of "nervous" fugitives!

Apparently realizing that Morrow's testimony was damaging, especially to the appellant Kremen, counsel for the defense conducted a lengthy cross-examination, covering 30 pages of the printed record, although the direct examination required only eight pages. The District Judge recognized that the cross-examination had "come to the point of badgering", and gave defense counsel five additional minutes in which to complete his questioning.

Charles E. Germany, owner of the cabin in question, said on the stand that the appellant Steinberg introduced himself to the witness as "Newberg" and presented the appellant Kremen as "his sister". On the occasion of Mr. and [fol. 963] Mrs. Germany's visit to the cabin, the appellant Kremen was "dusting the furniture or something around the house".

After leaving the cabin, Mr. and Mrs. Germany visited some neighbors. When they returned to their car, they saw Steinberg and Kremen playing Ping-pong.

About a month later, Germany alone visited the cabin again to collect the light bill. He saw an "extra man" there at that time. Steinberg, who seemed to act as the master of the household, introduced the man as a "buddy" of his, and motioned to Kremen to pay Germany for the light bill. She obeyed. Ross was identified by Germany as the "extra man" he saw at the cabin at that time.

Mrs. Ruth Lackey, who helps her husband in their general store in Twain Harte, "very definitely" identified Mrs. Kremen as a shopper in the store, "buying a fairly large order". She also identified the appellant Steinberg, but remarked, that "he didn't look like he does now. He had a mustache."

Mrs. Roger Butler, whose husband is an electrical contractor, said that Mrs. Kremen came to her house to get Butler to repair the cabin pump, since "They had no water in the house". Mrs. Kremen gave Mrs. Butler two keys and asked the latter to have her husband come out to do the repair job. Ten or fifteen minutes later, Kremen went back to the house and asked for the keys back. "She thought she might fix the pump herself,' but according to Mrs. Butler, "She said she wanted him to come out when he

arrived". Apparently Mrs. Kremen thought better of turning over the keys to the Communist hideout, even to an electrical repairman!

Butler himself then took the stand and identified Mrs. Kremen as being present when he did some work at the cabin in August, 1953.

Dorothy Henrichsen, co-proprietor with her husband of a sports shop in Twain Harte, said that the appellants Kremen and Steinberg visited the shop in June or July, 1953, in company with "another gentleman". In identifying Steinberg, the witness, like Mrs. Lackey, remarked that "he had a moustache at the time".

The trio came in to buy a pair of swim trunks "for a friend that was ill at the time". The witness said that she [fol. 964] tried to discourage them from taking the trunks "without the party being able to try them on, because there is no return or refund on swimming clothes". She described the second male customer as "tall, rather obese, (with) very ickey red hair and moustache, and . . . (not) a bit good looking". From Exhibits 2 and 3, the witness identified the second customer as Thompson.

Later, Mrs. Kremen went back to the store to return the trunks "because they wouldn't fit". Mrs. Henrichsen "wouldn't exchange them or give her her money back, and so she didn't care much for me after that. She went to my husband after that."

On cross-examination, Mrs. Henrichsen said that she also saw Coleman with Thompson, on the street. In other words, she saw Kremen, Steinberg, Coleman, and Thompson on the streets of Twain Harte.

The Henrichsens ordered Ping-pong balls for Mrs. Kremen, but they arrived after the appellant's arrest.

Glenn F. Ellis, of Danville, California, employed in a stationery firm of Oakland, California, identified the appellant Ross as the purchaser of a duplicating machine and supplies on June 28, 1953, at the Oakland shop. Ross used the name "Newman" on that occasion, Ellis said. Two invoices, exhibits in the case, covering Ross's purchases, referred to him as "R. E. Newman", and gave his address as "201 Oak Street, Redding".

Harry L. Sotzien, a butcher in Lackey's grocery store, supra, testified that he filled an order for sour cream and

frequent orders for "good cuts" of meat—the "best" he had—from a woman he identified as the appellant Kremen, in the summer of 1953. Some of the orders were of "great size", the meat purchases "ranging from four to twelve or fifteen dollars". Mrs. Kremen was the only purchaser of sour cream during that time, and it had to be ordered especially for her.

Phillip J. Moody, owner of a Shell service station at Santa Cruz, California, identified a "lubrication chart" showing that a 1950 five-passenger "metallic brown" Ford tudor coupe had been brought in on August 16, 1953, and identified the appellant Kremen—"The lady in red"—as the one that had brought in the car for servicing.

[fol. 965] 7. *Sections 3 and 371 of Title 18 Were Not Construed or Applied By the Court Below in a Manner Violative of the Due Process Guarantees of the Fifth Amendment*

In their very first and basic statement with regard to the District Court's construction and application of the Fifth Amendment of the Constitution, the appellants have fallen into palpable error. They assert that "The crime of accessory after the fact, after conviction of the principal, was not recognized at common law".

In Bishop on Criminal law, 9th ed., twice cited as an authority by the appellants, we find the following statement in Volume 1, Sec. 697, pages 500-501:

> "One mode of helping a felon is to rescue him from the lawful confinement, *either before or after his conviction;* and the rescuer may be indicted for the substantive offense of rescue, *or for being an accessory after the fact in the other's felony, at the election of the prosecutor.* The theory on which the prosecution proceeds differs a little in two forms, but not essentially." (Emphasis supplied)

But even if such had not been the rule under the common law, Congress had the undoubted power to enlarge the definition of accessory after the fact.

Accordingly, the argument of the appellants that "Section 3 was not intended to be applied in instances where

the aid was rendered after conviction" is wholly without merit.

Nor can we agree with their contention that "Evidence is wholly lacking of the existence of two separate and distinct agreements (one to "assist" Thompson and the other to "harbor" Steinberg)," or that "If there was any conspiracy at all in this case, which appellants stoutly deny, it was a single conspiracy to aid fugitives who were Communists."

From our careful study of the evidence, which has been fully outlined, supra, and which will be discussed hereinafter, we are convinced that there was substantial evidence to support the finding of two separate and disfinct agreements".

There was here no "stretching and tailoring of the accessory after the fact statute in a manner which violates [fol. 966] the due process guaranties of the Fifth amendment". The appellants were "accessories after the fact" *quoad* Thompson, in that they sought to "hinder or prevent" his *punishment* after his *conviction*. *Quoad Steinberg*, they were merely "concealing" him from *arrest*.

Section 3 *alone* refers to shielding from *punishment:* Section 1071 stops short of *that*, and concerns itself merely with the offense of shielding a person from "discovery and arrest".

The appellants' objections to the application of Section 3 and 371 are without validity.

8. *The Search and Seizure Were Lawful, and the District Court Did Not Err in Denying the Motions to Suppress*

The testimony in connection with the motions for the return of seized property and its suppression as evidence has been fully summarized *ante*. It would be a work of supererogation to repeat that summary here.

Suffice it to say, Morrow, the real estate broker, testified that the appellant Kremen, alias "Mrs. Lee Kaplan", rented the cabin through him, giving out the now-familiar story of the apocryphal "brother" suffering from "nerves". Special Agent Whelan told how F.B.I. agents had been observing the cabin from six o'clock that morning to R-hour (raid hour), or 1:05 that afternoon. The agents

observed all the appellants and their co-conspirator Thompson coming out of the cabin and re-entering it. About 30 or 45 minutes before the arrest, the officers knew "for sure" that the admitted "bail jumper" Thompson was one of the cozy Commie coterie, which turned out to be well-nurtured with New York steaks. Within an hour before the arrest, Agent Whelan "verified" Steinberg's presence in the premises.

The appellants apparently had spent the night at the cabin, since the F.B.I. men did not see any one enter the house since the dawn's early light, when the occupants began to emerge.

It is hornbook law that officers have the right to arrest without a warrant when a felony is being committed in their presence. They *knew* that Thompson and Steinberg were fugitives from justice. They had reason to believe that all the appellants were harboring Thompson and that the appellants Kremen, Ross, and Coleman were harboring the appellant Steinberg.

[fol. 967] It is likewise elementary that officers have a right, as an incident to a valid arrest, to search the place where the arrest is made.

We advert now to the *reasonableness* of the search.

For a proper understanding of this phase of the case, it is necessary to glance a moment at the prior record of the co-conspirator Thompson and the appellant Steinberg, in connection with violations of the Smith Act.

At the outset, it should be borne in mind that the appellants themselves concede that "Steinberg was indicted in 1951 for the same offense of which Thompson was convicted in 1949". Let us briefly examine the record of that indictment and that conviction.

Thompson was convicted in the United States District Court in New York, and his conviction was affirmed by the Second Court of Appeals on August 1, 1950. United States v. Dennis, 2 Cir., 183 F. 2d 201. The Supreme Court affirmed on June 4, 1951. Dennis v. United States, 341 U.S. 494. Thompson was admitted to bail pending the Supreme Court's review of decision of the Court of Appeals, and he absconded after an order on mandate had been entered by the District Court directing him and others who had been convicted with him, to surrender on July 2, 1951, to

the United States Marshal in New York City. He never did surrender but, as we have seen, was arrested at Twain Harte. See Williamson v. United States, 2 Cir., 1950, 184 F. 2d 280, opinion by Mr. Justice Jackson, acting as Circuit Justice, who extended Thompson's bail pending certiorari; and United States v. Thompson, 2 Cir., 1954, 214 F. 2d 545, affirming United States v. Thompson, DC N.Y., 1953, 117 F. Supp. 685, which was a judgment of criminal contempt against Thompson, handed down by the United States District Court for the Southern District of New York, based on Thompson's failure to respond to a surrender order. In that criminal contempt case, certiorari was denied, 1954, 348 U.S. 841.

In the words of appellants' counsel, Thompson was a "bail jumper", and at the time of his arrest in California "he was punishable not only as one who had been convicted of a crime but also as one who had failed to surrender in obedience to a court order".

[fol. 968] Steinberg, under the name of Sidney Stein, had been indicted in the United States District Court for the Southern District of New York for conspiracy to violate the Smith Act, and on June 20, 1951, a bench warrant was issued for his arrest.

At the time of the arrests, Agent Whelan informed both Thompson and Steinberg "that they were being arrested because of the warrants that were outstanding for the arrest of both of them in the Southern District of New York."

Against this factual background relative to the court history of the appellant Steinberg and the co-conspirator Thompson, and their sojourn at the cabin in the company of the appellants Kremen, Coleman, and Ross, their comrades, the legal relationship of the quintet becomes reasonably clear.

This legal relationship will be developed more fully hereinafter, in considering the specified error relating to the alleged insufficiency of the evidence to support the verdicts. For the time being, we need only point out that the agents had observed the appellants actually "assisting" Thompson, apparently to "hinder and prevent" his "apprehension and punishment".

The F.B.I. officers had reasonable cause to believe that a

felony was being committed in their presence. They did not need then to be in possession of all the facts.

The officers likewise had the right, incidental to a valid arrest, to search the place in which the arrest was made. Nor is the mere quantity of material taken objectionable, provided that the arrest was valid and the search made thereunder was reasonable. Mere quantity of material seized does not make the search unreasonable.

In Harris v. United States, 1947, 331 U.S. 145, 148-155, heavily relied upon by the appellants themselves, two valid warrants of arrest were issued, one charging a violation of the Mail Fraud Statute and the other alleging a crime arising under the National Stolen Property Act. Five F.B.I. agents arrested the suspect and searched his apartment, consisting of a living room, bedroom, bathroom, and kitchen. The agents stated that the object of their search was to find two canceled checks that were thought to have been used in effecting a forgery involved in the charges *set forth in the warrants of arrest.*

[fol. 969] The conviction appealed from, however, was on sixteen counts of an indictment charging violations of the *Selective Training and Service Act of 1940 and Sec. 48 of the Criminal Code as it then stood* (35 Stat. 1098, 18 U.S.C. Sec. 101 (1940 ed.)), relating to the receipt, etc., of property stolen from the United States.

As the search neared its end, one of the agents discovered an envelope containing eight "Notice of Classification" cards and eleven Registration Certificates. It was that evidence upon which the conviction *for violation of the Selective Training and Service Act was based, and it was conceded that the evidence was in no way related to the crimes for which the prisoner was initially arrested and that the search which led to its discovery was not conducted under the authority of a search warrant.*

In an opinion affirming the conviction, Mr. Chief Justice Vinson said:

> "This Court has also pointed out that it is only *unreasonable* searches and seizures which come under the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.' (case cited)

"The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.

"The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in Agnello v. United States, *supra*, 269 U.S. 20, 30 . . . it was said: 'The right, without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.' It is equally clear that a search incident to arrest which is otherwise reasonable, [fol. 970] is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subjected to search.

"Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. Petitioner was in exclusive possession of a four-room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested. The canceled checks and other instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment . . . the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.

"Similar considerations are applicable in evaluating petitioner's contention that the search was, in any event, too intensive (as contended in the instant case). Here again we must look to the particular circumstances of the particular case, . . .

"Nor is this a case in which law-enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime. In the present case the agents were in possession of facts indicating petitioner's probable guilt of the crimes for which warrants of arrest were issued. . . .

"In keeping the draft cards in his custody petitioner was guilty of a serious and *continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material. If entry upon the premises be authorized* [fol. 971] *and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated.*

". . . we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable." (Emphasis supplied)

In United States v. Rabinowitz, 1950, 339 U. S. 56, the defendant was convicted of selling and of possessing and concealing forged and altered obligations of the United States with intent to defraud. The question there presented involved the reasonableness of a search without a search warrant of a place of business consisting of a one-room office, the search being incidental to a valid arrest.

A printer who possessed plates for forging "overprints" on canceled stamps was taken into custody. He disclosed that the defendant, a dealer in stamps, and an old offender, was one of the customers to whom he had delivered stamps bearing forged overprints. A postal employee was sent to the defendant's place of business to buy stamps bearing overprints. He bought four stamps, which were sent to an

expert to determine whether the overprints were genuine. A report was received that the overprints were forgeries, though the stamps themselves were genuine. The overprints had been placed upon the stamps after cancellation, and not before, as was the Government's practice. A warrant for the defendant's arrest was obtained.

Armed with this warrant, Government officers and two stamp experts went to the defendant's place of business, a one-room office open to the public. The defendant was arrested, and over his objection the officers searched the desk, safe and file cabinets for about an hour and a half. They seized 573 stamps, on which it was later determined that overprints had been forged.

The defendant was indicted on two counts, one charging the sale of four forged and altered stamps, and the second [fol. 972] alleging that the defendant had possessed and concealed, with intent to defraud, the 573 forged and altered stamps.

The question there was whether the 573 stamps, the fruits of the search, were admissible in evidence. The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In restricting the ambit of the Fourth Amendment, the Supreme Court said:

> "It is unreasonable searches that are prohibited by the Fourth Amendment. (Case cited) It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required. The right of the 'people to be secure in their persons' was certainly of as much concern to the framers of the Constitution as the property of the person. Yet no one questions the right, without a search warrant, to search the person after a valid arrest. * * *
>
> ". . . *Even if the warrant of arrest were not suffi-*

cient to authorize the arrest for possession of the stamps, the arrest therefor was valid because the officers had probable cause (as in the instant case) *to believe that a felony was being committed in their very presence.* (Case cited * * *

"The right 'to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed' seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest. (Case cited) *It became accepted that the premises where the arrest was made, which premises were under the control of the person arrested and* [fol. 973] *where the crime was being committed, were subject to search without a search warrant. Such a search was not 'unreasonable'.*" (Cases cited) Pages 60 and 61.

The Court then quoted at some length from Marron v. United States, 1927, 275 U. S. 192, 199, in which the following pertinent statement is found:

"The authority of officers to search and seize the things by which the nuisance was being maintained, *extended to all parts of the premises used for the unlawful purpose.*" (Emphasis supplied) Page 62

The appellants assert that "searches without search warrants are condemned unless they fall within two narrow classes"; namely, where the searches are "incident to a valid arrest" (as here) or in "special circumstances". Continuing, the appellants complain as follows:

". . . the arresting officers were confronted by no emergency . . . The preparations made for at least two days prior to the arrest demonstrate without question that the officers could easily have applied for warrants—and without in any way interfering with their handling of the case."

The appellants quote extensively from the case of Trupiano v. United States, 1948, 334 U. S. 699, 708, including the following sentences:

> "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be strictly limited right. *It grows out of the inherent necessity of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.*" (Emphasis supplied)

The appellants' reliance upon *Trupiano* is unfortunate; for that case has been specifically overruled by the Supreme Court itself on the very point that we are here discussing; namely, the "inherent necessity of the situation at the time of the arrest". In United States v. Rabinowitz, supra, 339 U. S. at pages 64-66, the Court said:

> [fol. 974] "Assuming that the officers had time to procure a search warrant, were they bound to do so? We think not, because the search was otherwise reasonable, as previously concluded. In a recent opinion, *Trupiano v. United States*, 334 U.S. 699, this Court first enunciated the requirement that search warrants must be procured when 'practicable' in a case of search incident to arrest. * * *
>
> "A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law

officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

"It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required." (Emphasis is the Supreme Court's)

[fol. 975] Addressing its attention once more to *Trupiano*, the Supreme Court continued:

"To the extent that *Trupiano* v. *United States*, 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case *is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.*" (Emphasis supplied)

Without laboring this point further, we hold that, both on reason and on authority, and "in the total atmosphere of the case", the search and seizure in the instant case did not violate the Constitution.

9. *The Evidence Was Sufficient to Support the Conviction of Each of the Appellants*

In the first place, the appellants complain that, "while the indictment charges that Thompson had been convicted of conspiring to organize a society for the overthrow of the government by force and violence, the proof was that

Thompson had been convicted of conspiring to organize a society to 'teach and advocate' the forcible overthrow of the government".

The recital in the indictment that Thompson was convicted in the United States District Court in the City of New York did not state an issue in the present case. That Thompson was convicted is both undisputed and indisputable. The District Judge instructed the jury:

> "Now, with reference to that first count of the indictment, let me say to you that you need not examine the facts or the record presented to determine whether or not Robert Thompson committed the crime therein described, because I now tell you and instruct you as a matter of law that the record shows that Thompson was convicted of the said crime in a United States court, and that judgment was pronounced against him and has become final. Consequently, Thompson did commit the crime of conspiring to teach the overthrow and de- [fol. 976] struction of the United States Government by force and violence."

Actually, the technical charge of which Thompson was convicted was "conspiring to organize the Communist Party of the United States as a group "to teach and advocate the overthrow and destruction' of the government 'by force and violence', and 'knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying' the government by 'force and violence'." United States v. Dennis, 2 Cir., 1950, 183 F. 2d 201, 205, affirmed, 1951, 341 U.S. 494, 517.

An inartificiality in pleading, *by way of recital* in an indictment, of the conviction of an individual who is not even a defendant in the case at bar, cannot be tortured into being a basis for reversible error in failure of proof. Neither could incomplete language in a trial judge's instruction be thus magnified.

The full story of Thompson's conviction and "bail-jumping" is stated in the appellants' own opening brief. There is no merit to their technical objection that "The conviction of Thompson as charged here was not proved"

Finally, the appellants urge that "There was insufficient

evidence of knowledge" of the identity of Thompson and Steinberg, and that "There was insufficient evidence of acts of assistance".

Here again, as in the case of the evidence relative to the search and seizure, we have already summarized the appellee's showing on the facts to so ample an extent that it would be superfluous to repeat that summary here. It might be helpful, however, to review briefly a few of the highlights:

(a) *Steinberg*

F.B.I. Agent McCann had known Steinberg since November, 1950. He testified that a wallet, pointed out by Steinberg as belonging to him, contained a fishing license, three business cards, etc., all containing the name "Newberg", but no material bearing the name "Steinberg". Special Agent Erickson had previously testified that certain papers found in the cabin likewise bore the name "Newberg". John Lautner, the former high official in the Communist Party, [fol. 977] had been acquainted with Steinberg, as well as with Ross and Coleman, for several years, and had occupied offices in the same Communist Party headquarters in New York in which Steinberg and Coleman had their offices. He saw Steinberg in the presence of Thompson at the 1948 National Convention of the Party.

Steinberg seemed to be the head of the household in the cabin.

(b) *Ross*

One of the papers taken from Ross was a mysterious note to one "Jim", containing the "hush-hush" references so frequently found in subversive epistolary literature. Two invoices covering Ross's purchases of a duplicating machine and supplies at an Oakland store showed that he used the name "R. E. Newman" and gave Redding as his address. Lautner saw Ross in the presence of Steinberg at the 1948 National Convention of the Communist Party. He also saw Ross in the presence of Thompson.

(c) *Coleman*

This Communist was present at the 1948 New York State convention of the Party, which Thompson attended. Cole-

man was in the presence of Thompson "numerous times" at the Communist Party headquarters. In connection with his duties in the Party, Lautner had occasion to work with Coleman, who, like Lautner, was a member of "the New York State Organization Commission". On June 5, 1953, nearly three months before the Twain Harte raid, Coleman traded in an Olds automobile for a Hudson at St. Louis, signing the name "Gordon" to the necessary papers. During the July 4 holiday that same year, Coleman and Thompson were members of a party of four that rented two boats at a "fishing dock or boat resort" in Camdenton, Missouri.

(d) *Kremen*

Mrs. Shirley Kremen, alias Lee Kaplan, alias Lee Lefko Kaplan, proved herself to be the most accomplished fictionist of the lot. Her fabrications were worthy of Mark Twain [fol. 978] and Bret Harte, the two writers after whom the picturesque Tuolumne hide-out was probably named. Although the record is silent as to this latter point, it is far from silent regarding Mrs. Kremen's fecund imagination. Special Agent Harter examined the contents of her purse at the time of the raid. He found therein two library cards, a fishing license, a campfire permit, a Social Security card, a driver's license, a gas and electric bill, a water bill, and an invoice. These divers documents possessed one trait in common: the name "Shirley Kremen" or any variations thereof were completely absent therefrom. On the contrary, the name favored by Mrs. Kremen at that time was "Kaplan".

The most brilliant flights of Mrs. Kremen's imagination, however, were reserved for Morrow, the unsuspecting Twain Harte real estate broker.

Her name, she said to Morrow, was "Mrs. Lee Kaplan". She wanted a cabin in a quiet spot for "a brother sick with nerves". Her brother was a musician. She liked the Germany place because "there was a stream there and it was very quiet".

Mrs. Kremen was not quite so successful in dealing with another Twain Harte business person. This happened to be a member of her own sex—Mrs. Dorothy Henrichsen, who, with her husband, owned a sports shop. In company

with Steinberg and another man, identified as Thompson, Mrs. Kremen went to the sports shop to buy a pair of swim trunks "for a friend who was ill at the time". Mrs. Henrichsen tried to dissuade the trio from buying swim trunks for an absentee wearer-to-be, "because there is no return or refund on swimming clothes". Mrs. Henrichsen's sensible advice was not taken, and when Mrs. Kremen later tried to exchange the trunks, she was unsuccessful. Thereafter she dealt solely with *Mr.* Henrichsen.

The foregoing excerpts, isolated from their respective contexts, of necessity give only an incomplete picture of the subterfuges, deceptions, half-truths, and downright lies resorted to by the quartet in their effort to shield Thompson and Steinberg from capture.

[fol. 979] Only a careful and critical perusal of the 941 pages of the transcript can give anything like an adequate picture of the situation.

Such perusal we have endeavored to make, and we find that the record supports the verdicts of the jury and the judgments of the court based thereon.

It will not do to give lip service to "that great Anglo-American institution, the trial jury", and then set aside a verdict whenever it happens to embody a conclusion with which some appellate judge happens to disagree.

10. *The Inartificial Recital of the Charge on Which Thompson Was Convicted Does Not Vitiate. Counts 1 and 2.*

The appellants complain that "The first and second counts of the indictment do not state any offense against the United States since they do not charge Thompson with a violation of the Smith Act." We have already referred to the looseness in pleading Thompson's conviction, and have fully set forth the precise charge on which he was convicted. We have also given the substance of the present indictment.

Counts 1 and 2 of the indictment specifically refer to Thompson's violation of "Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act".

The appellants were fully apprised of the crime of which Thompson was convicted. Not only was the trial fully cov-

ered by the press and officially reported in the Federal Reporter, Second Series, as already stated, but the very sections of the Smith Act under which Thompson was prosecuted are enumerated in Counts 1 and 2 themselves. Entirely illusory is the appellants' expressed fear that "The omission of the statutory language . . . lays appellants open as a practical and legal possibility to another prosecution for the same offense".

Count One recites that on October 14, 1949, Thompson was convicted in New York for violations of three named sections of the Smith Act. It alleges that the appellants, knowing of his conviction, assisted Thompson in order to hinder his "apprehension and punishment".

[fol. 980] Count Two again refers to Thompson's violation of the three sections of the Smith Act, and avers that the appellants conspired with each other and divers other persons to assist Thompson so as to prevent his apprehension and punishment.

These two counts are sufficiently specific to enable the appellants to prepare their defense and to protect them after their conviction from substantial danger of a new prosecution for the same offense. Their attack upon these counts is entirely without merit.

11. *The District Court's Instructions Were Adequate.*

(a) The appellants grudgingly concede that the lower court's instruction on reasonable doubt was proper when they say:

> "Although the trial court paid lip service to the rule that in order to justify a conviction the circumstances had to be not only consistent with guilt but inconsistent with innocence . . ."

Translated into non-polemical language, this means that the instruction on reasonable doubt was correct. In any event, we so hold.

The appellants do object, however, to the District Judge's comment on the rule, as follows:

> "Now, that rule has been given by judges for a long time. I myself have considerable doubt about it, al-

though I tell you that it is the law, because I think it is just a hifaluting way of saying what I have already said to you, namely, that you can't find a verdict of guilty unless you are convinced of guilt beyond a reasonable doubt; and of course if you can draw two reasonable hypotheses from the same circumstances, of course there must be a reasonable doubt. But nevertheless I give you this rule because for a long time it seems to have been in the books."

The insistence of the appellants seems to be upon the "hypothesis of guilt" versus the "hypothesis of innocence" rule; for they say that "it is quite possible to have no reasonable doubt about a hypothesis of guilt while the evidence yet may also justify a hypothesis of innocence".

[fol. 981] Yet it is precisely this "hypothesis of guilt" versus "hypothesis of innocence" rule that the Supreme Court has roundly criticized in no uncertain terms. In Holland v. United States, 1954, 348 U.S. 121, 139-140, the Court said:

"The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions (Cases cited), but the better rule is that where the jury is properly instructed (as here) on the standards for reasonable doubt, *such an additional instruction on circumstantial evidence is confusing and incorrect,* (Authorities cited)." (Emphasis supplied)

The appellants also complain that "the court expressly told the jury that there was no difference between a case in which the evidence was direct and one in which it was only circumstantial, since in both cases all that was required was the absence of a reasonable doubt. But that is not the law. . . ."

In the *Holland* case, however, supra, 348 U.S. at page 140, the Supreme Court succinctly declared that the statement to which the appellants object *is* the law:

"Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Ad-

mittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. *If the jury is convinced beyond a reasonable doubt, we can require no more.*" (Emphasis supplied)

(b) The appellants also assert error in the trial court's instruction that, "as a matter of law the record shows that Thompson was convicted of the said crime (described in the first count of the indictment)". We have already fully [fol. 982] discussed the matter in connection with the sufficiency of the evidence. The instruction complained of discloses no reversible error.

12. *The Appellants Are Not in a Position to Complain of the Court's Failure to Give Certain Instructions: the Charge Given by the District Judge Was Adequate.*

The appellants assert that certain "full and complete instructions on the meaning and significance of the words used in the accessory and harboring statutes" were not given by the District Judge.

After the Court had delivered its charge to the jury, counsel for the appellants made the following statement relating to the above alleged omissions:

"Mr. Gladstein: The only other thing, your Honor, please, I don't have them listed, but we submitted, you Honor knows, a number of instructions dealing with such matters as harboring, concealing, accessory after the fact, matters of that kind which I suppose your Honor feels that portion thereof with which your Honor agrees or which you Honor approves has been synthesized in your own instructions.

"But I do feel we requested matters of law to be given to the jury which are not comprehended within your Honor's instructions, and they are specifically set forth in our instructions. *I don't bear them in mind*

at the moment. But I do want to take exceptions to your Honor's failure to give those instructions to the jury, particularly on the subject of what the purpose of harboring and concealing must be.

"In other words, by way of illustration, that not every form of assistance to a person who is a fugitive constitutes a violation of the law, and matters of that kind, which were embraced within the instructions which were submitted." (Emphasis supplied)

Rule 18(2)(d) of this Court provides in part as follows:

"* * * When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds [fol. 983] of the objections urged at the trial."

Rule 30 of the Federal Rules of Criminal Procedure reads in part:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

A glance at the casual, vague, and generalizing remarks of counsel quoted above plainly reveals that neither Rule 30 of the Rules of Criminal Procedure nor our Rule 18(a)(d) was observed by him. Indeed, after the appellee's brief called attention to Rule 30, the subject of omitted instructions was not thereafter mentioned in the appellants' reply brief.

In recent years, this Court has repeatedly announced its intention to enforce the above two rules, and has so fully spelled out its reasons for doing so that they will not be repeated here.[4]

Nevertheless, we have carefully examined the instructions of the learned and experienced District Judge and find

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[4] See Mitchell v. United States, 9 Cir., 1954, 213 F. 2d 951, 957, certiorari denied, 1955, 348 U.S. 912.

that, contrary to the appellants' contentions, he *did* deliver "full and complete instructions on the meaning and significance of the words used in the accessory and harboring statutes".

There is no merit to this sixth and final point urged by the appellants in their brief.

13. *Conclusion*

Sections 2 and 101 of the Internal Security Act of 1950 (50 USCA Secs. 781 and 811) contain vitriolic philippics against Communism.[5] These sections are not pious generalizations such as might be found in a preamble or a joint [fol. 984] resolution. *They are formal statutory enactments by Congress;* enactments coequal in authority with any other Federal legislation; enactments that all American judges, State or Federal, are sworn to uphold until such Congressional pronouncements are declared unconstitutional by the Supreme Court.

These statutory "indictments" of Communism are too lengthy to quote in full. We content ourselves with reproducing the first and ninth "counts":

> "*Sec. 781 Congressional finding of necessity*
>
> "As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—
>
> "(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by *treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictator-*

[5] It should be pointed out, however, that Sec. 4(f) of the same Act specifies that "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

ship in the countries throughout the world through the medium of a world-wide Communist organization.

• • • • •

"(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement." (Emphasis supplied)

This Congressional pronouncement accords with our own views and deep feelings on the subject. We do not propose to chase Constitutional phantoms that will lead us to assist a group of subversives in escaping condign punishment. We must avoid *leaning* too far backward in being "fair" to Communists, lest we *fall* backward into an abyss of error and give these enemies of the United States "aid and comfort"!

[fol. 985] The Constitution does not require the judges who apply it to dwell in an ivory tower, or to reason in a vacuum, or to throw common sense out of the window.

The evidence in the instant case makes it clear that all the appellants knew that Thompson had been convicted under the Smith Act, and that he was a fugitive. They also knew of Steinberg's indictment.

We believe that there was ample lawful evidence to support the judgments of guilty against the appellants Kremen, alias "Kaplan"; Steinberg, alias "Stein" alias "Newberg"; Coleman, alias "Gordon"; and Ross, alias "Newman".

The judgments are affirmed.

HEALY, CIRCUIT JUDGE

I agree with the result reached in the affirming opinion.

The evidence of the guilt of the appellants on the counts of which they were convicted was necessarily circumstantial. The situation involved was very much out of the ordinary—so much so that there is little or no precedent for it. The accused persons were obviously individuals of intelli-

gence, and it would strain credulity to the breaking point to infer from the circumstances anything other than that they knew perfectly well who each of their associates was and for what purpose all had gathered together in this remote cabin in the depths of the mountains. The jury were properly and fully instructed as to the law and the burden of proof resting on the government, and I see no ground upon which we would be justified in disturbing their verdict.

As to the search and seizure by the officers, I think it was warranted by law in the circumstances shown.

DENMAN, Chief Judge, dissenting:

The court's opinion violates the long established and essentially required practice of considering separately the different appeals of the four appellants, presenting in all eighteen contentions of error. The opinion's pages of high rhetoric of the obvious, denouncing those who would seek [fol. 986] to overthrow the government by force, creates no excuse for such a violation. Rather it enforces our obligation to proceed in the non-Bolshevik method of such separate consideration of each of the several contentions of each defendant presented here. It is pertinent that the trial judge found no such condign wickedness in the demeanor of the defendants before him or in the reports of the probation officer. Of the, 18 U.S.C. § 3 cases he imposed less than the maximum sentences and by making some of the sentences concurrent, none received the maximum sentence.

I. THE CONVICTIONS OF KREMEN, ROSS AND COLEMAN OF VIOLATING 18 U.S.C. § 1071.

A. What Must Be Proved.

To convict one of violating Section 1071 the Government must prove that he harbored or concealed, so as to prevent discovery or arrest, any person for whose arrest a warrant had been issued under any law of the United States. Moreover the defendant must be shown to have harbored or concealed for the purpose of preventing discovery or arrest, "after notice or knowledge of the fact that a warrant or process had been issued for the apprehension of such person".

Thus the Government must prove four things: the issuance of a federal warrant, the act or acts of harboring or concealing, a purpose to prevent discovery or arrest, and the knowledge of the defendant of the existence of the federal warrant. Mere occupancy of a house with a fugitive is not sufficient, and "general malevolence is not enough if the specific knowledge required by the statute is lacking." Fullbright v. United States, 91 F. 2d 210, 212 (Cir. 8, 1937).

There is no question that a federal warrant had been issued for the arrest of Steinberg on June 20, 1951 after his indictment on a charge of violating the Smith Act. [18 U.S.C. § 2385] The issue here is whether, as to each defendant considered individually, the Government proved acts of harboring or concealing Steinberg in order to prevent his discovery or arrest and the knowledge of each that a federal warrant had been issued for his arrest.

[fol. 987] B. What Was Proved As To Each Defendant Accused of Violating 18 U.S.C. § 1071.

(i) *Shirley Kremen.* There was ample evidence introduced to show that this defendant harbored or concealed Steinberg in order to prevent his discovery or arrest. She procured the secluded cabin "for her sick brother," did the shopping and housework, and helped establish a false identity for herself and Steinberg. These are acts of harboring and concealing done at least to prevent Steinberg's discovery.

However, the Government failed to prove that she did these acts to prevent discovery with knowledge that a federal warrant had been issued for Steinberg's arrest. The evidence showed only that she knew she was hiding him. It did not go further. There was no showing that she knew Steinberg's actual identity, his position in the Communist Party or even that he was a member of that Party. There is no evidence in the record that indicates that Mrs. Kremen was a Communist or even sympathetic to the aims and purposes of that Party.

There are many reasons why Mrs. Kremen might have hidden Steinberg. Among others she might have known of the existence of the federal warrant. But equally as pos-

sible she might have thought that state police were seeking the man she knew as "Newberg", and she might have had a reason to protect him. She might have been a Communist or sympathetic to the Communist Party and told that Steinberg was to go "underground" in order to assume a new identity so that he could act in the future without being identified as a Communist.

The Government had the burden of negativing these alternative inferences. It, but not the majority opinion, recognizes this. The Government argues that an analogy to a stolen property situation should be applicable. One found with such property has the burden of explaining how he received it. The Government asks this court to place a similar burden on one found in the presence of a fugitive when such person has done acts of concealing to prevent discovery. However, unlike personal property, Steinberg could transport himself from place to place and could give Mrs. Kremen any number of reasons why she should hide him. There is no reason to infer that he told her of the [fol. 988] warrant rather than some other reason. The Government's position would place upon defendants in this type of case the burden of proving their innocence.

Mrs. Kremen's conviction on this count should be reversed.

(ii) *Samuel Coleman.* The evidence indicates that Coleman arrived at the Twain Harte cabin only a week before the arrest on August 27, 1953, although Kremen, Steinberg and perhaps Ross had been there since June or July of that year. The evidence produced by the Government showed only that Coleman had lived at the cabin and knew who Steinberg was. There was no evidence of any acts of harboring or concealing. He was not shown to have even helped with the housework or shopping. His mere presence in Twain Harte for a week does not constitute harboring or concealing Steinberg to prevent his discovery or arrest. It is more likely that Steinberg was concealing Coleman as far as the evidence in the record is concerned. There is no evidence at all that Coleman knew that a warrant for Steinberg's arrest had been issued.

Coleman's conviction on this count should be reversed.

(iii) *Carl Ross.* To show Ross' acts of barboring or concealing Steinberg the United States introduced two documents found on his person at the time of his arrest. One was the "contact" letter mentioned in the majority opinion which indicated that Ross was to secretly meet someone. The other was a grocery list calling for large quantities of food. The jury could have inferred that Ross was relaying messages to and from the people at the cabin and was providing Steinberg with food. These are acts of harboring or concealing to prevent discovery or arrest.

The evidence to show why Ross did these acts is as follows: Ross knew that Steinberg was a Communist Party member, that he had altered his appearance, and that he was living at a remote cabin. Ross was relaying messages to and from the cabin. Ross was member of the Communist Party himself. The Government apparently urges that the jury could draw the following inferences. Communist Party members were interested in Smith Act indictments, especially of members who were leaders and whom they knew personally. Such indictments were publicized in the Communist Party press as well as in newspapers of general circulation. It was likely that Ross, being [fol. 989] a Communist, would have read of the indictment of Steinberg, and that Ross would have realized that a warrant for arrest often follows an indictment. When he discovered Steinberg using an assumed name, having an altered appearance, and living in a remote cabin, he would have inferred that Steinberg was hiding from such a warrant.

However, there is no showing that Steinberg's indictment or warrant for arrest was ever publicized in the Communist Party press, or that, if they were so publicized, that Ross had read about it. Ross, like Mrs. Kremen, could have hidden Steinberg for any number of reasons.

The court in the Fullbright case, supra, concerning a prosecution under Section 1071, made the following observations which are relevant here:

> "Knowledge that the fugitives were evading officers in general or that a state government had issued warrants for their arrest is immaterial. Such acts are beyond the purview of the statute."

* * * * *

"Every circumstance pointed out is consistent with knowledge that Langan and Sparger [the criminals harbored in the Fullbright case] were criminals, but it is equally consistent with appellant's ignorance of outstanding [federal] warrants for their arrest."

Fullbright v. United States, 91 F. 2d 210, 213, 214 (Cir. 8, 1937).

II. Conspiracy of Kremen, Ross and Coleman to Violate 18 U.S.C. § 1071.

Since the Government has failed to prove a case of harboring, as that crime is defined in Section 1071, against any of these three defendants it follows that the count charging a conspiracy to harbor Steinberg must fall as well for the same reasons.

[fol. 990] III. The Convictions of Kremen, Ross, Coleman and Steinberg of Violating 18 U.S.C. §3.

A. What Must Be Proved.

All of the appellants were convicted of being accessories after the fact to Robert Thompson's Smith Act conviction. Section 3 of Title 18 provides:

"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact."

Therefore to convict appellants the Government must prove that (1) they knew Thompson had committed an offense against the United States, (2) they received, relieved, comforted or assisted Thompson, and (3) they did so in order to hinder or prevent his punishment. Again the evidence as to each appellant must be considered separately.

B. What Was Proved As to Each Defendant Accused of Violating 18 U.S.C. §3.

(i) *Shirley Kremen.*- Mrs. Kremen received, relieved, comforted and assisted Thompson by providing food and housing for him. However, there is no evidence to support

an inference that she did so to prevent his punishment or that she had knowledge that Thompson had committed an offense against the United States. Thompson arrived at the cabin only a week before the arrest although Mrs. Kremen had been there some three months. There is no evidence she knew who Thompson was, that he was a Communist or that he was hiding from anyone. The evidence is just as consistent with the inference that she was hiding Steinberg and regarded Thompson as a trusted friend of Steinberg's who had come to visit or discuss business as it is with the inference of her knowledge as to who Thompson really was. No evidence was admitted which would show that she had any reason to follow in the newspapers the first Smith Act trial where Thompson was convicted, the appeal or Thompson's "bail jumping". [fol. 991] The conviction as to this count should be reversed.

(ii) *Carl Ross.* Ross' grocery shopping activities and contacts with others to bring information to the cabin constituted acts of receiving, relieving, comforting and assisting Thompson. The question is whether he knew that Thompson had committed an offense against the United States and whether Ross' assistance was designed to prevent Thompson's punishment. Ross knew Thompson as a Communist leader before Thompson's Smith Act conviction. Ross disappeared from his Minneapolis, Minnesota home shortly after that conviction and established a false identity for himself. He aided Thompson after seeing him with dyed red hair, noticing a large weight increase and learning that Thompson was using the name of Brennan. The jury could reasonably infer that Ross was aware of Thompson's Smith Act conviction and acted to prevent his punishment.

There was sufficient evidence to support the judgment as to this count.

(iii) *Samuel Coleman.* Coleman procured a car for Thompson and traveled with him to isolated resorts in Missouri and Montana. He helped establish a false identity for Thompson as "Brennan." These are acts of receiving, relieving, comforting or assisting Thompson. The jury could reasonably infer that Coleman knew that Thomp-

son had been convicted of violating the Smith Act and assisted him in order to prevent his punishment. Coleman was an officer of the Communist Party and well acquainted with Thompson. He disappeared from his New York home, leaving his wife and children, shortly after Thompson's conviction. He knew Thompson was dying his hair red and using a false name. Coleman established a false identity of his own. The jury could infer that such an official would know of the Smith Act conviction of one of the top leaders of the Communist Party.

There was sufficient evidence to support the conviction as to this count.

(iv) *Sidney Steinberg.* Steinberg, who was apparently in charge of the group at the cabin, provided lodging for Thompson. This was an act of receiving, relieving, comforting or assisting him. The jury could reasonably infer [fol. 992] that Steinberg knew that Thompson had been convicted of violating the Smith Act and had assisted him in order to prevent his punishment. Steinberg and Thompson were both high leaders of the New York Communist Party. Steinberg knew Thompson, having worked with him a number of years including the year Thompson's trial began.

There was sufficient evidence to support the conviction as to this count.

IV. Conspiracy of Kremen, Ross, Coleman and Steinberg to Violate 18 U.S.C. §3.

Since the Government has failed to prove a case of assisting Thompson to prevent his punishment with knowledge that he had committed a crime against the United States as to appellant Kremen, it follows that the count charging her with a conspiracy to so assist Thompson must fall as well for the same reasons. The counts charging Coleman, Ross and Steinberg with a conspiracy to so assist Thompson should be affirmed.

V. Search and Seizure.

Is the taking to San Francisco of all of the personal property of the four appellants from the four-room house

and the two nearby automobiles, and the failure to make any search thereof until in San Francisco some two hundred miles from the house, a violation of the Fourth Amendment provision that appellants shall be "secure in their persons, houses, papers and effects against unreasonable searches, and seizures?"

Certainly the seizure and transportation to San Francisco, the home of none of the appellants, of all their personal property other than that found to constitute evidence was beyond the authority of the federal officers. No question was asked of appellants whether they desired a caretaker to watch the house to see that such other property as the television set, etc., was not stolen. While this wrong done is not cognizable in this case it makes clear that the intent was to search their "papers and effects" in San Francisco and not in the place of arrest which may have [fol. 993] been authorized by Harris v. United States, 331 U.S. 145 and other cases.

In my opinion such a search of the "papers and effects" in San Francisco violates the Fourth Amendment. The situation is analogous to that in United States v. Lefkowitz, 285 U.S. 452, recognized as still the law in United States v. Rabinowitz, 339 U.S. 56 at page 62.

(File endorsement omitted.)

[fol. 994] In United States Court of Appeals for the Ninth Circuit

No. 14359

Shirley Kremen, Carl Ross, Samuel Irving Coleman, and Sidney Steinberg, Appellants

vs.

United States of America, Appellee

Judgment—January 20, 1956

Appeals from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the

Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this cause be, and each of them hereby is affirmed.

[File endorsement omitted.]

[fol. 995] In United States Court of Appeals for the Ninth Circuit

Order Denying Petition for Rehearing—April 20, 1956

On consideration thereof, and by direction of the Court, Denman, Chief Judge dissenting, It is ordered that the petition of Appellants, filed March 21, 1956, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of the above cause be, and hereby is denied.

[fol. 996] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 997] Supreme Court of the United States

[Title omitted]

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 18, 1956.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 7th day of May, 1956.

[fol. 998] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 162

[Title omitted]

ORDER ALLOWING CERTIORARI. Filed October 8, 1956.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2383-8)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 182

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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GLADSTEIN, ANDERSEN,
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Table of Contents

	Page
Citation to opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and constitutional provisions involved	9
Statement	9
Specification of errors to be urged	14
Reasons for granting the writ	15
1. The arrests of petitioners Kremen and Coleman and the searches of their persons, all without warrant, violated rights guaranteed to them by the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. The search of the house and the seizure of the books, papers and effects found therein violated the same constitutional rights of all petitioners, including Steinberg. It was error to deny the motion to suppress the evidence so obtained	15
2. The statutes involved (Sections 3, 371 and 1071 of Title 18, United States Code) were unconstitutionally applied to petitioners here in that: (A) petitioners were placed in double jeopardy by an unconstitutional pyramiding of offenses; (B) Section 3 was construed in a manner contrary to the common law, to the prior decisions in other circuits, and to the requirements of the Fifth Amendment; and, (C) the statutes were applied to the petitioners despite the absence of any evidence of scienter	23
(A) Petitioners were placed in double jeopardy by an unconstitutional pyramiding of offenses	23
(B) Section 3 was construed in a manner contrary to the common law, to prior decisions in other circuits, and to the requirements of the Fifth Amendment	28
(C) The statutes were applied to petitioners despite the absence of evidence of scienter	30

Page

1. The harboring counts 30

2. The accessoryship counts 31

3. The conviction of petitioners on Counts 1 and 2 of the indictment cannot be sustained because (A) these counts did not allege facts sufficient to constitute an offense against the United States; (B) there was a fatal variance between the pleading of Thompson's conviction and the proof; and (C) the charge with respect to Thompson's conviction was erroneous 33

(A) Counts 1 and 2 did not allege facts sufficient to constitute an offense against the United States 33

(B) There was a fatal variance between the pleading of Thompson's conviction and the proof 34

(C) The charge with respect to Thompson's conviction was erroneous 36

Conclusion 38

Table of Authorities Cited

Cases	Pages
Bell v. United States, 349 U.S. 81	25
Bennett v. United States, 227 U.S. 333	34
Berger v. United States, 295 U.S. 78	34
Bollenbach v. United States, 326 U.S. 607	36
Braverman v. United States, 317 U.S. 49	26, 27
Cole v. Arkansas, 333 U.S. 916	36
Commonwealth v. Miller, 2 Ashm. 61	29
Contee v. United States, 215 F.2d 324 (D.C. Cir.)	18
DeJonge v. Oregon, 299 U.S. 353	36
Dennis v. United States, 341 U.S. 494	3, 5, 9, 35
Ex parte Collett, 337 U.S. 55	30
Frohwerk v. United States, 249 U.S. 204	27
Fulbright v. United States, 91 F.2d 210 (8 Cir.)	8, 16, 31, 32
Gebardi v. United States, 287 U.S. 112	26, 27
Go-Bart Importing Co. v. United States, 292 U.S. 344	7, 18, 21
Gouled v. United States, 255 U.S. 298	7, 18, 21
Guilbeau v. United States, 288 F. 731 (5 Cir.)	34
Hammer v. United States, 271 U.S. 620	35
Harris v. United States, 331 U.S. 145	17, 20
Holland v. United States, 209 F.2d 516 (10 Cir.)	35
Honig v. United States, 208 F.2d 916 (8 Cir.)	18
Johnson v. United States, 333 U.S. 10	16
Lott v. United States, 218 F.2d 675 (5 Cir.)	18
Nardone v. United States, 308 U.S. 338	12
Neal v. United States, 102 F.2d 643 (8 Cir.)	32, 34
Nye & Nissen v. United States, 336 U.S. 619	28
Pereira v. United States, 347 U.S. 1	23
Pettway v. United States, 216 F.2d 106 (6 Cir.)	35
Pinkerton v. United States, 328 U.S. 640	26, 27
Rabinowitz v. United States, 339 U.S. 56	17, 18, 19, 20
Rea v. United States, 350 U.S. 214	22
Rent v. United States, 209 F.2d 893 (5 Cir.)	18

	Pages
Rex v. Burridge, 3 P.Wms. 439	29
Rose v. United States, 149 F.2d 755 (9 Cir.)	35
Schneiderman v. United States, 320 U.S. 118	33
Short v. United States, 91 F.2d 614 (4 Cir.)	25
Skelly v. United States, 76 F.2d 483 (10 Cir.), cert. den. 295 U.S. 767	7, 8, 28, 32
Slochower v. Board of Higher Education, 350 U.S. 551	33
Stack v. Boyle, 342 U.S. 1	32
Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368	30
Steinberg v. United States, 100 L.Ed. ..... (May 28, 1956)	22
Trupiano v. United States, 334 U.S. 669	17, 18
United States v. Adams, 281 U.S. 202	27
United States v. Arrington, 215 F.2d 630 (7 Cir.)	18
United States v. Ausmeier, 152 F.2d 349 (2 Cir.)	16
United States v. Chapman, 3 F.Supp. 903 (S.D. Ala.)	28
United States v. Cohen, 197 F.2d 26 (3 Cir.)	27
United States v. Cruikshank, 92 U.S. 542	34
United States v. DiRe, 332 U.S. 581	16
United States v. Hutcheson, 312 U.S. 219	35
United States v. Jeffers, 345 U.S. 48	18
United States v. Katz, 271 U.S. 354	26, 27
United States v. Lefkowitz, 285 U.S. 452	7, 18, 19, 20, 21
United States v. National City Lines, 337 U.S. 78	30
United States v. Paglia, 190 F.2d 445 (2 Cir.)	28
United States v. Peoni, 100 F.2d 401 (2 Cir.)	28
United States v. Perlstein, 126 F.2d 789 (3 Cir.)	16
United States v. Pincourt, 159 F.2d 917 (3 Cir.)	16
United States v. Rabinowich, 238 U.S. 78	27
United States v. Thompson, 214 F.2d 545 (2 Cir.)	3
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218	25
Weiman v. Updegraf, 344 U.S. 183	33
Williamson v. United States, 184 F.2d 280	21

Constitutions

United States Constitution:	
Fourth Amendment	9, 15
Fifth Amendment	9, 15, 28
Sixth Amendment	9, 15

Statutes

	Pages
Smith Act:	
Section 2	33
Section 3	28, 33
Section 5	33
18 U.S.C. 3	3, 8, 9, 15, 23, 28
18 U.S.C. 371	8, 9, 15, 23
18 U.S.C. 1071	4, 8, 9, 15, 23
18 U.S.C. 2384	35
18 U.S.C.A. 2385	33, 35
28 U.S.C.A. 1254(1)	2

Other Authorities

Bishop, Criminal Law (Ninth Edition) 500-01	29
Federal Rules of Criminal Procedure, Rule 52(b)	35
Halsbury, Laws of England, Second Edition, Sections 593-99	29
2 Hawkins, P. Code, Section 29	29
House Report 1600, 80th Congress, 1st Session	30
House Report 2055, 80th Congress, 1st Session	30
Perkins, Parties to Crime, 89 Pennsylvania Law Review 581	29
Report 1620, 80th Cong., 2nd Sess., 94 Cong. R. 7928, 8906	30

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No.

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioners, and each of them, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 20, 1956.

CITATION TO OPINIONS BELOW.

A written order of the District Court, denying a motion for the return of property allegedly illegally

seized, was not reported, but appears at pages 26-28 of the Record and is printed in the appendix hereto. Opinions relating to the fixing of bail are reported at 114 F. Supp. 899 and 207 F.2d 772. The three opinions of the Court of Appeals which accompanied the affirmance of the judgments of conviction are reported at 231 F.2d 155, 178 and 178.[1] They appear at pages 944, 985 and 985 of the Record and are printed in the appendix hereto, as are the judgment of the Court of Appeals and its order denying the petition for rehearing.[2]

JURISDICTION.

The judgment of the Court of Appeals was entered on January 20, 1956 (231 F.2d 155; R. 994, App. p. 74). A timely petition for rehearing was denied April 20, 1956 (231 F.2d 155; R. 995, App. p. 75). On May 7, 1956, Mr. Justice Douglas entered an order extending until June 18, 1956 the time within which petitioners might file this petition. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED.

Petitioners were arrested, without the benefit of arrest, or any, warrants, in August of 1953 in a

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[1]Circuit Judge Lemmon wrote an "affirming opinion"; Circuit Judge Healy wrote a concurring opinion; Chief Judge Denman wrote a dissenting opinion.

[2]Chief Judge Denman dissented from the order denying the petition for rehearing. No opinions accompanied that order.

"raid" (R. 395, 529) conducted by agents of the Federal Bureau of Investigation at a dwelling house in Twain Harte, California. Present, in addition to petitioners, was Robert Thompson, one of the defendants in *Dennis v. United States*, 341 U.S. 494, who had failed to surrender after this Court's decision in that case. (See *United States v. Thompson*, 214 F.2d 545 [2 Cir.].) At the time of the arrest, the agents, again without benefit of search, or any, warrants, seized all of the papers, books, personal effects and movable property located on the premises (R. 286), and transported them, together with two automobiles and their contents, some 200 miles to San Francisco where they were studied and analyzed at the officers' leisure (R. 215, 289).

A four count indictment (R. 3-8) charged petitioners and others[3] with:

1. Violating 18 U.S.C. 3 by receiving, relieving, comforting and assisting Thompson in order to prevent his apprehension and arrest, knowing that Thompson had been convicted of "wilfully and knowingly conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence;

[3]One person (Patricia Blau), later arrested at a different place, was jointly charged with petitioners, but as to her a judgment of acquittal was entered at the close of the prosecution's case (R. 75, 912). Another person (Carl Ross), who was found guilty with petitioners, was unable to raise the bail required by the Court below and having completed his sentence, is not a party to this petition.

the aforesaid being in violation of Sections 2, 3 and 5 of the Act of June 20, 1940, commonly known as the Smith Act" (R. 3).

2. Conspiring to commit the aforesaid offense with knowledge that Thompson had violated Sections 2, 3 and 5 of the Smith Act (R. 4). The only overt act alleged which has reference to Thompson was that petitioners and others occupied a cabin with Thompson on the day of the arrest, August 27, 1953.

Petitioners Kremen and Coleman were further charged with:

3. Violating 18 U.S.C. 1071 by harboring and concealing petitioner Steinberg, "with notice and knowledge . . . that a warrant had been issued for [his] apprehension" (R. 6).

4. Conspiring to commit the aforesaid offense with knowledge that a warrant had been issued for Steinberg's arrest (R. 7). The only overt act involving these petitioners which had reference to Steinberg was that they occupied a cabin with him on the day of the arrest (R. 8).

A motion to dismiss the indictment (R. 9-14) for failure to state an offense; because it was vague and indefinite; and because, as applied to petitioners here, the statutes upon which it was based were unconstitutional, was overruled (R. 72). Also overruled were motions for discovery and inspection (R. 14), for a bill of particulars (R. 15), and for a pretrial subpoena (R. 17). Motions (R. 18-26) for the return of property seized in the raid and its suppression

as evidence were also denied (R. 26-28). However, the prosecution was ordered to (R. 28), and did, furnish a twenty-five page inventory of the seized property (Exhibit A). The motions to return the property and to suppress it as evidence were later renewed, and after testimony was taken on the motions (R. 89-138, 164-80), they were again denied (R. 73). Throughout the trial, by appropriate objections to the introduction of evidence and otherwise, petitioners continued to press this point (R. 204, 216, 217, 228, 231).

The evidence adduced upon the trial showed (1) that Thompson had been convicted in *Dennis* of conspiracy to organize the Communist Party "to teach and advocate" the forcible overthrow of government;[4] (2) that Thompson had not surrendered after *Dennis* (there was no showing that Thompson was ever ordered or directed to surrender or that petitioners ever knew of such order or direction, if one existed); (3) that there was process outstanding for Steinberg (there was no showing that petitioners knew of the existence of such process); (4) that petitioners were with Thompson in the Twain Harte house on the morning of the arrests; (5) that agents of the Federal Bureau of Investigation seized from the persons of petitioners[4a] and Thompson, and from the house, papers and documents bearing fictitious names; (6) that the appearance of Steinberg and Thompson was different in 1953 from what it had

[4]Ex. 121. The quoted words are omitted from the indictment here (*supra*, p. 3).

[4a]Not, however, petitioner Coleman, *infra*, n. 10.

been in earlier years; (7) that for some time preceding the raid Coleman had been in Thompson's company at places in Missouri and Montana; (8) that Coleman had associated with Thompson and possibly Steinberg in New York City ten years earlier in the Communist Party.[5]

Motions for judgments of acquittal, made on behalf of petitioners at the conclusion of the Government's case, were denied (R. 75). At the conclusion of the entire case these motions were renewed and ruling was reserved thereon. The jury returned a verdict of guilty against petitioners on all counts.[6] Motions for judgments of acquittal, in arrest of judgment, and for a new trial, subsequently made, were all denied (R. 76).

Judgments of imprisonment were pronounced as follows:

Petitioner Kremen: one year on Count 1 and one year on Count 2, to run concurrently, six months on Count 3 and six months on Count 4, to run con-

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[5]Except for the fact that they were all at the house at the time of the arrest, this last item was the *only* connection between Coleman, Thompson and Steinberg. This, however, does not even apply to petitioner Kremen, concerning whom there is no evidence whatsoever of Communist membership or association, or any connection with any of the others save and except in Twain Harte during the summer of 1953. To remedy this deficiency in its evidence, the prosecution sought unsuccessfully to show that while a student in Los Angeles in 1949, she was a schoolgirl radical with a "left wing attitude" (R. 847).

[6]The jury was out approximately nine hours (R. 929, 939). Just twenty minutes before it returned its verdict, it reported its inability to agree on some counts (R. 937). After further instructions (R. 938-39), it reached a verdict.

currently with each other and with Count 1: total imprisonment, one year.

Petitioner Coleman: one year on Count 1, one year on Count 2, six months on Count 3 and six months on Count 4, all to run consecutively: total imprisonment, three years.

Petitioner Steinberg: two years on Count 1, one year on Count 2, to run consecutively: total imprisonment, three years.

Notices of appeal (R. 76-80) were timely filed.

The Court of Appeals, Chief Judge Denman dissenting, expressing its "own views and deep feeling on the subject [of Communism]" said it would not "chase Constitutional phantoms that will lead us to assist a group of subversives in escaping condign punishment" (231 F.2d 178; R. 984, App. p. 61).[7] It held therefore that, despite the absence of arrest and search warrants, and in the face of this Court's opinions in *Gouled v. United States*, 225 U.S. 298; *United States v. Lefkowitz*, 285 U.S. 452, and *Go-Bart Importing Co. v. United States*, 292 U.S. 344,[8] petitioners' constitutional rights were not invaded by the arrests, searches and seizures; that, despite the decisions in *Skelly v. United States*, 76 F.2d 483 (10

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[7]Although there was no evidence to justify such a characterization, Judge Lemmon referred to petitioners as "these enemies of the United States" (231 F.2d at 178; R. 984, App. 61). Judge Healy's brief concurrence was more moderately and judiciously worded (231 F.2d 178; R. 985; App. p. 62).

[8]None of which were mentioned in the affirming opinion, although they were cited to the Court below in the briefs, and although the *Lefkowitz* case was cited in the dissenting opinion.

Cir.), cert. den. 295 U.S. 767, and *Fulbright v. United States,* 91 F.2d 210 (8 Cir.),[9] the statutes involved were constitutionally applied to petitioners; and that, despite the variance between the indictment and the proof, the convictions could stand.

The questions presented by the foregoing are:

1. Whether the arrests of petitioners Kremen and Coleman without warrant violated rights guaranteed to them by the Fourth, Fifth and Sixth Amendments to the Constitution; and whether the searches of all petitioners, the search of the house, and the seizure of all the books, papers and the other personal property therein—all without warrant—and the subsequent introduction into evidence against all petitioners of material so obtained, violated rights guaranteed to them by the Fourth, Fifth and Sixth Amendments to the Constitution.

2. Whether Sections 3, 371 and 1071 of Title 18 United States Code, or any of them, were unconstitutionally applied to petitioners here.

3. Whether the indictment stated a crime against the United States and whether the proof varied from it, contrary to the requirements of the Fifth Amendment to the Constitution.

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[9]These opinions were not mentioned in the affirming opinions, although they were cited to the Court below in the briefs, and *Fulbright* is referred to in the Chief Judge's dissenting opinion.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth, Fifth and Sixth Amendments to the Constitution, and Sections 3, 371 and 1071 of Title 18, United States Code, are printed in the appendix hereto.

STATEMENT.

The following is a resumé of that portion of the Government's brief in the court below headed "Statement of Facts," as it applies to petitioners here:

Petitioners were indicted on four counts: (1) all petitioners were charged as accessories after the fact to Thompson in a violation of the Smith Act; (2) all petitioners allegedly conspired to violate the accessory after the fact statute; (3) petitioners Kremen and Coleman allegedly harbored Steinberg, and (4) said petitioners allegedly conspired to harbor Steinberg.

All counts of the indictment related to August 27, 1953, at which date both Thompson and Steinberg were fugitives from justice. Steinberg had been indicted in the Southern District of New York for conspiracy to violate the Smith Act, and a bench warrant had been issued for his arrest (R. 892-93). Thompson had already been found guilty of violations of the Smith Act (R. 893) and was at liberty pending appeal. The judgment against him was ultimately affirmed (*Dennis v. United States,* 341 U.S. 494), and a warrant for his arrest was issued (R. 894).

Both Thompson and Steinberg remained fugitives for about two years (R. 340, 421-22).

Thompson, Steinberg and Coleman had been important functionaries in the Communist Party and had for a long time worked together at party headquarters in New York (R. 503, 509-12). Coleman (R. 610) left his family at approximately the time Thompson and Steinberg became fugitives from justice. The fugitives were found, along with Coleman and Kremen, at a secluded cabin at Twain Harte, in the Sierra Nevada Mountains of California, on August 27, 1953. All of them were there under false identities. None of them had visible means of support.

Kremen, on June 20, 1953, had rented the cabin under the false identity of Mrs. Lee Kaplan (R. 619, 621), telling the real estate agent that she wanted it for her sick brother (R. 620). Nowhere in the record does it appear that Steinberg and Kremen were related or that his health was other than good. She was looking for a place "where it would be quiet and rather secluded" (R. 620-21). When the owner of the cabin visited there, Steinberg pretended that he was a "Mr. Newberg" and that Kremen was his sister (R. 669-70). Steinberg at all times acted as the master of the household; he gave the orders and he made the introductions (R. 671-72). During the period preceding the arrest, in July and August, 1953, Kremen purchased large quantities of food (R. 780). On one occasion Kremen and another person purchased hair dye (R. 683).

Thompson was at Twain Harte at least twice; on both occasions Thompson had dyed red hair (R. 420, 701). He was seen prior to the arrest, in the company of Steinberg, Kremen and Coleman (R. 709).

Coleman purchased a Hudson automobile on June 5, 1953, at St. Louis, Missouri, under the assumed identity of "William Gordon" (R. 546, 548). The keys to this automobile were found in Thompson's pocket at the time of the arrest (R. 430, 555, 558). Coleman rented a cabin and a boat near Camdenton, Missouri, for himself and a heavy set man in July, 1953 (R. 565-76). In August, 1953, Thompson purchased a fishing license in Bigfork, Montana, under the name of "J. F. Brennan" (R. 596-97) and during a portion of that month Coleman and Thompson, using their false names, stayed at a Cabin approximately 30 miles from Bigfork (R. 601). They arrived and left in a Hudson automobile with Missouri license plates (R. 602-03). The Hudson automobile purchased by Gordon in Missouri entered California on August 20, 1953 (R. 409-10).

On August 27, 1953, F.B.I. agents arrested Thompson, Steinberg, Coleman and Kremen at the cabin (R.96-97, 200-01), after Thompson and Steinberg were recognized as fugitives (R. 323-24). It was apparent that all who were arrested had spent the night in the cabin, and were rather well established there (R. 189, 192-95, 210-12; Exs. 14-18 incl., and Exs. A-1 through A-14). The arrest took place approximately 35 minutes after an agent positively identified Thompson (R. 200,

323, 324), although Thompson (and Steinberg, too) looked considerably different than he had before (R. 325-26).

A wallet which was on Thompson's person at the time of his arrest contained his false identification as "Brennan" (R. 430, 432; U.S. Ex. No. 97).

Steinberg admitted ownership of a wallet which contained false identification documents in the name of "Newberg" (R. 331, 334, 335; U.S. Ex. No. 3). Other identification documents for "Newberg" were found in the cabin (R. 230-31; U.S. Exs. Nos. 21, 22, 23).

Kremen's purse contained her false identification as "Kaplan," in the form of a library card, a fire permit, a social security card, an identification card, an automobile insurance paper and an automobile operator's license (R. 362, 363; U.S. Ex. No. 86).

False identification documents for "Gordon" (the name assumed by Coleman [R. 546-48, 565, 576]) were also found in a billfold located in the cabin (R. 899).[10]

Petitioners were indicted on October 22, 1953 (R. 16). In February 1954 they moved for the return of property seized at the cabin (R. 18, 21), which motion was denied on the ground that there was no allegation of any interest in the property seized or the premises searched (R. 26-28; App. pp. 1-3). Later, pre-trial mo-

[10]None of the evidence against petitioner Coleman was obtained from a search of his person. It all stemmed from the original illegal search *of the cabin* and, for reasons to be urged below, must be rejected as the "fruit of the poisonous tree". Cf. *Nardone v. United States*, 308 U.S. 338, 341.

tions to suppress (R. 22, 163, 183) were made and denied, as were similar motions made on many occasions throughout the trial on the specific ground that the search was "illegal and improper" (R. 202, 204, 216, 217, 219, 220, 228, 231, 244). A special agent of the Federal Bureau of Investigation testified that, although at the time of the arrest the agent in charge had asked petitioners if they would identify their property and specify if there was anything they wanted the F.B.I. to take care of, petitioners stood mute (R. 214-15).

The foregoing summary of the evidence taken from the Government's brief below neglects to mention a factor of prime significance with relation to the questions presented because of the absence of arrest or search warrants, i.e., that preparations for the arrests began *at least* 72 hours prior to the raid. Thus the record shows (1) that agents were dispatched from New York City in time to be in San Francisco on August 25, 1953, and to participate in the raid two days later (R. 352, 438); (2) that two days before the raid, agents left San Francisco for the Twain Harte area, carrying photographs and fingerprints of Thompson and Steinberg (R. 537); (3) that the next day additional agents left San Francisco to participate in the raid, but without any photographs or fingerprints of petitioners Kremen or Coleman (R. 273-74); (4) that at least 24 hours before the raid, agents had petitioners and Thompson under surveillance (R. 525) but observed only "normal activities"

(R. 117-20, 195); (5) that a constant vigil was maintained for the last 8 hours before the arrests (R. 133, 271); (6) that during all this time an elaborate two-way communication system had been set up (R. 197); (7) that surveillance through the use of an electric company truck had been arranged (R. 533-4); and (8) that a matron had been dispatched to the scene (R. 275-6).

Obviously preparations for the raid were carefully made in advance and everything was done to assure its success. But at no time during this period, which was at least 72 hours long, did any agent of the Government apply to a United States Commissioner or Judge for arrest or search warrants. They did everything, but this one simple act of obeisance to the Constitution of the United States.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred in holding:

1. That the arrests of petitioners Kremen and Coleman without warrant did not violate rights guaranteed to them by the Fourth, Fifth and Sixth Amendments to the Constitution; and that searches of all petitioners and the house, and the seizure of all the books, papers and other personal property therein—all without warrant—and the subsequent introduction into evidence against all petitioners of the material so obtained, did not violate rights guaranteed to all of them by the Fourth, Fifth and Sixth Amendments to the Constitution.

2. That Sections 3, 371 and 1071 of Title 18 of the United States Code, or any of them, were constitutionally applied to petitioners here.

3. That the indictment stated a crime against the United States and that the variance between the indictment and the proof did not require a reversal of the conviction of petitioners in the face of the requirements of the Fifth Amendment to the Constitution.

REASONS FOR GRANTING THE WRIT.

1. **THE ARRESTS OF PETITIONERS KREMEN AND COLEMAN AND THE SEARCHES OF THEIR PERSONS, ALL WITHOUT WARRANT, VIOLATED RIGHTS GUARANTEED TO THEM BY THE FOURTH, FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. THE SEARCH OF THE HOUSE AND THE SEIZURE OF THE BOOKS, PAPERS AND EFFECTS FOUND THEREIN VIOLATED THE SAME CONSTITUTIONAL RIGHTS OF ALL PETITIONERS, INCLUDING STEINBERG. IT WAS ERROR TO DENY THE MOTION TO SUPPRESS THE EVIDENCE SO OBTAINED.**

The affirming opinion says that it is "hornbook law" that officers have a right to arrest without warrant when a felony is being committed in their presence; that the officers knew that Thompson and Steinberg were fugitives; and that they, therefore, had reason to believe that Kremen and Coleman were harboring them and that Kremen and Coleman, together with Steinberg, were harboring Thompson (231 F.2d 168; R. 966; App. p. 37). It is on this basis that the raid is justified.

But the difficulty with this view is, that, even conceding the officers knew who Thompson and Stein-

berg were, they had no reason, by their own testimony, to believe that they were witnessing the commission of a felony by Kremen or Coleman. During the entire period of time that the house was under surveillance, petitioners were seen by the officers to be engaged in merely normal lawful activities (R. 117-20, 195); indeed, none of them did anything even to excite a suspicion that they were violating the law (R. 133).

Since merely being in the presence of a fugitive is not a crime (*Fulbright v. United States,* 91 F.2d 210 [8 Cir.]; cf. *United States v. Perlstein,* 126 F.2d 789 [3 Cir.]; *United States v. Ausmeier,* 152 F.2d 349 [2 Cir.]; see *United States v. Pincourt,* 159 F.2d 917, 920 [3 Cir.]), the arrest of these petitioners without warrant was not justified upon the theory expressed by the Court below, or upon any other theory. In the absence of evidence which would ground a reasonable belief that these petitioners were committing a felony, their arrests were illegal (*United States v. DiRe,* 332 U.S. 581; *Johnson v. United States,* 333 U.S. 10).

The searches which in turn were sought to be justified by these arrests (R. 967) were therefore also illegal. In any case, the searches were so utterly unreasonable that, apart from the foregoing, they cannot be justified under the decisions of this Court. This latter point has application not only to petitioners Kremen and Coleman, but to petitioner Steinberg as well.[11]

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[11]See *infra,* n. 28.

To support a contrary view, the affirming opinion relies on *Harris v. United States,* 331 U.S. 145, and *Rabinowitz v. United States,* 339 U.S. 56. Neither of these cases, however, can justify what happened here. In the first place, neither justifies the sweeping character of the search revealed by this record: books, papers, clothing, furniture, musical instruments, personal effects, automobiles, indeed "everything" at the cabin, save that which the realtor identified as belonging to him (R. 286). All of this material was then taken to San Francisco for "a more detailed study, examination and search" (R. 289). In the cited cases the seizure was so much more limited as to make them clearly distinguishable. *Harris v. United States, supra,* at 149, n. 9; *Rabinowitz v. United States, supra,* at 58-59. But more important, in the cases relied upon, the objects seized, were, unlike those here, contraband and it was illegal merely to possess them: draft cards stolen from the United States (*Harris*), or forged and altered postage stamps (*Rabinowitz*). This Court went no further than the facts of those cases in holding that the seizures therein involved were reasonable. Those cases are no authority for the wholesale seizure of non-contraband material involved here.

The affirming opinion also makes much of *Rabinowitz's* purported overruling of *Trupiano v. United States,* 334 U.S. 669, cited by petitioners below. However, after *Rabinowitz,* this Court cited *Trupiano* for the proposition that even contraband, if unlawfully seized, *should be suppressed as evidence* though not

necessarily returned to the prisoners. *United States v. Jeffers,* 345 U.S. 48.

Furthermore, as to *Trupiano,* Courts of Appeal in other circuits have found its analysis a helpful guide in the solution of search and seizure problems: at least in cases not involving Communists. Those Courts have gone back to the sources of *Trupiano—Gouled v. United States,* 255 U.S. 298; *United States v. Lefkowitz,* 285 U.S. 452, and *Go-Bart Importing Co. v. United States,* 292 U.S. 344[12]—and have applied the constitutional principles—not "phantoms"—which this Court has repeatedly enunciated. Among such recent opinions in other circuits are: *Lott v. United States,* 218 F.2d 675 (5 Cir.); *United States v. Arrington,* 215 F.2d 630 (7 Cir.); *Honig v. United States,* 208 F.2d 916 (8 Cir.); and *Contee v. United States,* 215 F.2d 324 (D.C. Cir.).

Indeed, there is a direct conflict between the opinion below and that of the Fifth Circuit on the extent to which *Rabinowitz* did in fact overrule *Trupiano.* In *Rent v. United States,* 209 F.2d 893 (5 Cir.), a conviction was reversed because of the illegality of the search. On the point here at issue the Court said:

> "The Government apparently takes the position that, since the decision in United States v. Rabinowitz, supra, the practicability of procuring a search warrant is not to be considered in deciding whether the search without a warrant was reason-

[12]None of which are even mentioned in the affirming or concurring opinions and the principles of which require a reversal of the judgments here.

able. *We do not understand that the decision in that case went so far.*

* * * * * *

"Rather, the Court said that whether the search was reasonable 'depends upon the facts and circumstances—the total atmosphere of the case.'

"We think that one of the facts and circumstances to be considered in this case is the fact that there was no reason for not submitting to a magistrate the evidence which the officer deemed sufficient to justify a search of the automobile. The need for effective law enforcement is not satisfied as against the right of privacy by any necessity for the officer to take the decision into his own hands. *The officer had ample opportunity to apply for a search warrant* and in our opinion a search of the automobile without a warrant was not justified." (209 F.2d at 899.)

Indeed, once it is recognized that *Harris* and *Rabinowitz* deal only with the seizure of contraband, their inapplicability to the case at bar becomes manifest and the correctness of Chief Judge Denman's view that the controlling case is *United States v. Lefkowitz*, 285 U.S. 452, becomes apparent.

In *Lefkowitz* which, incidentally, as Judge Denman points out, is approved in *Rabinowitz*, the search was almost, but not quite, as extensive as that there. There the officers proceeded

"... to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondent's guilt of crime . . . Their

conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken." (285 U.S. at 463-464.)[13]

Such a search, despite the existence of valid arrest warrants, was held to violate the defendant's rights under the Fourth and Fifth Amendments. This Court noted the significance of those amendments in our constitutional system and the necessity for construing them liberally in order to protect those accused of crime—especially of political crime. It pointed out that the cases permitting searches and seizures without warrants were limited to such items of contraband as stolen, forfeited or concealed property, counterfeit coins, burglar tools, gambling paraphernalia, and illicit liquor (285 U.S. at 465-66).[14]

Lefkowitz enunciated the reasons for requiring search warrants:

"... The informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be obtained by resort to

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[13]At 285 U.S. 459 in Footnotes 1, 2 and 3, the Court set out the material obtained in the course of the search in the *Lefkowitz* case. A comparison of that material with that which was seized in this case, as revealed by the 25 page inventory in evidence here (Ex. A), demonstrates that the officers in *Lefkowitz* were much more restrained than were the officers here.

[14]Thus neither *Harris* nor *Rabinowitz* have modified *Lefkowitz*: on the contrary, they merely apply its principles to the seizure of *contraband*.

search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends capture of persons accused of crime." (285 U.S. at 464.)

The record here makes it manifest, as indeed does the affirming opinion, that there was plenty of excitement at the arrest of petitioners. It shows that the arresting officers exercised neither caution nor sagacity in connection with their search and seizure. This is not surprising; indeed, it is probably natural and inevitable in the case of most arrests, and undoubtedly is to be expected in a case of arrests of persons regarded as political dissidents. But it was precisely because law enforcement officers could not be trusted, under such circumstances, to safeguard the rights of those accused of crimes, that the constitutional prohibitions were insisted upon by the people when the Bill of Rights was adopted. And it is because such officers cannot sit in objective judgment upon their own conduct that courts must undertake a calm and solemn judicial review thereof. If the alleged political coloration of petitioners is eliminated from consideration here,[15] then such a review must result in a constitutional condemnation of the conduct of the arresting officers.

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[15]Cf. Mr. Justice Jackson's observations in granting bail to the *Dennis* defendants:

"But the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the bundle, we also cast aside protection for the liberties of more worthy critics who may be in opposition to the government of some future day." *Williamson v. United States*, 184 F.2d 280, 284.

In *Rea v. United States*, 350 U.S. 214, decided just a few months ago, this Court vigorously reiterated the underlying principles:

> "The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings." (350 U.S. at 217-18).

Because of the departure by the court below from principles enunciated by this Court in the *Lefkowitz, Gouled, Go-Bart* and *Rea* cases, because of the conflict between the decision of the court below and that of the other circuits mentioned above, and in order to exercise its supervisory power over lower federal courts and officers,[16] the writ should be granted and the case reviewed by this Court.

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[16] As Mr. Justice Douglas said, in fixing petitioner Steinberg's bail herein, just last month:

> "... involved [in this case] are standards of law enforcement for federal officials." *Steinberg v. United States*, 100 L.Ed. ——, May 28, 1956.

2. THE STATUTES INVOLVED (SECTIONS 3, 371 AND 1071 OF TITLE 18, UNITED STATES CODE) WERE UNCONSTITUTIONALLY APPLIED TO PETITIONERS HERE IN THAT: (A) PETITIONERS WERE PLACED IN DOUBLE JEOPARDY BY AN UNCONSTITUTIONAL PYRAMIDING OF OFFENSES; (B) SECTION 3 WAS CONSTRUED IN A MANNER CONTRARY TO THE COMMON LAW, TO THE PRIOR DECISIONS IN OTHER CIRCUITS, AND TO THE REQUIREMENTS OF THE FIFTH AMENDMENT; AND, (C) THE STATUTES WERE APPLIED TO THE PETITIONERS DESPITE THE ABSENCE OF ANY EVIDENCE OF SCIENTER.

(A) Petitioners were placed in double jeopardy by an unconstitutional pyramiding of offenses.

At the time of the raid petitioners were told that they were being arrested because they were "harboring" the alleged fugitives (R. 101). This offense, of course, is a violation of 18 U.S.C. 1071 and carries with it a maximum penalty of six months imprisonment and a $1,000 fine. However, by the subsequent addition of a charge of accessoryship to Thompson's offenses (18 U.S.C. 3) and charges of two separate conspiracies (18 U.S.C. 371), the Government was able to obtain the return of an indictment which carried potential penalties of eight and one-half years imprisonment and $17,000 in fines for petitioners Coleman and Kremen, and slightly less than that for petitioner Steinberg. The sentences actually imposed, while not reaching these maxima, were all in excess of that permitted under 18 U.S.C. 1071.

This Court has permitted a single act or series of acts to supply the basis for convictions of separate offenses only "so long as each requires the proof of a fact not essential to the other" *(Pereira v. United States,* 347 U.S. 1, 9). Here, however, by the very

facts of the case, *all* of the proof which established the harboring of Steinberg also established the accessoryship after the fact to the Thompson conviction.

Certainly as to petitioner Kremen this is true. There is no evidence as to her save and except that which deals with the rental of the house and its occupancy and use by both Steinberg and Thompson. As to her, there was no additional fact which was proved or required to be proved with relation to Thompson in addition to that required to be proved and proved with relation to Steinberg.[17]

As to petitioner Coleman, while additional facts were proved (the travelling with Thompson in Missouri and Montana), they were not *required* to make out the accessoryship offense. This must be so, since Kremen and Steinberg (and Ross[18]) were found guilty of the accessoryship offense without any such additional evidence relating to them. It is manifest therefore that, on the theory adopted below, such evidence was unnecessary to establish accessoryship and that mere presence in the cabin was enough for that purpose.[19] But if mere presence in the cabin is all that is required to make out both the harboring and the accessoryship offense then petitioners Kremen and

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[17]She presents this as a separate point on her own account. See *infra*, n. 28.

[18]Not a petitioner here; see note 3, *supra*.

[19]It follows logically that if what is said above is not true, then the accessoryship convictions of Steinberg and Kremen have been sustained without proof of an essential element of the offense. The Government cannot have it both ways.

Coleman were placed in double jeopardy by their trial and conviction on both charges, and more particularly by the *consecutive* sentences imposed against them on each charge.

Such a result is contrary to the rule that federal criminal statutes are not to be construed as creating multiple offenses, simply because the prohibited criminal act has multiple objects. Cf. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218; *Bell v. United States*, 349 U.S. 81; *Short v. United States*, 91 F.2d 614, 620-24 (4 Cir.).

Furthermore, not only were *the same acts* required to be shown in connection with the two substantive counts, but *these same acts* also laid the basis for the two conspiracy counts. While it is true that a conspiracy involves the element of an "agreement" among several persons, and while one person alone may commit the crimes of accessoryship and harboring, the fact is — and the record here reveals it to be so — that when a multiplicity of defendants are involved in harboring or accessoryship situations, they *of necessity* act in concert. They can commit the substantive crime in no other way.

Indeed, this could have been the only theory upon which the Government's offer of "*all* [the] evidence against *all* defendants" (R. 901) was received by the trial court (R. 75). It could not have been on the usual theory that co-conspirators may bind each other, for (1) the jury was never instructed that the evidence so broadly received was limited to the conspiracy counts alone and (2) the "conspirators" were not identical

in the two counts.[20] Since "*all* evidence was admitted against *all* defendants" on all counts, it is clear that no distinction was made in the Government's handling of the evidence, the trial judge's receipt of it, or the jury's understanding of it, as between the substantive counts and the conspiracy counts. Thus, *on this record* the substantive offenses are seen to have been merged in the conspiracy. In such a case the conspiracy charged may not be added to the substantive charge. See *United States v. Katz,* 271 U.S. 354, 355-56; *Gebardi v. United States,* 287 U.S. 112, 121-22; *Pinkerton v. United States,* 328 U.S. 640, 643. This point applies to Steinberg as well as to the other petitioners.

Finally, the prosecution split what was at most a single conspiracy into two separate conspiracies. If there was any conspiracy shown by this record, it was a conspiracy to aid persons who were fugitives from Smith Act prosecutions. There was no evidence to show an agreement to aid Steinberg separate and apart from one to aid Thompson, or *vice versa.* Such evidence as was relied upon to establish the existence of an agreement, applied equally to both conspiracy counts, indeed it was admitted as bearing on both counts. The overt acts alleged are substantially identical in both counts (R. 4, 8). In such a situation a single agreement may not be split up into multiple offenses, even if more than one statute is contemplated to be violated. *Braverman v. United States,* 317 U.S.

[20]Steinberg was named as a conspirator in the second, but not the fourth count; Thompson in the fourth, but not the second (R. 4, 6).

49; *Frohwerk v. United States,* 249 U.S. 204; *United States v. Rabinowich,* 238 U.S. 78; *United States v. Cohen,* 197 F.2d 26, 29 (3 Cir.); cf. *United States v. Adams,* 281 U.S. 202, 204.

In view of the foregoing, and remembering that consecutive sentences were imposed on the various counts, it is clear that the affirming opinion erred in substituting "pages of high rhetoric of the obvious" for "the long established and essentially required practice of considering separately the different appeals of the four appellants" (213 F.2d 178; R. 985; App. p. 63) on a record presenting some eighteen different specifications of error.

The prosecution, the trial Court, and the affirming judge permitted petitioners to be convicted and sentenced on a series of separate and disparate counts although all the evidence against all of them at best established only *one* violation of law. This situation manifests a serious conflict between the decision below and the opinions of this Court in the *Katz, Gebardi, Pinkerton, Braverman, Frohwerk* and *Rabinowich* cases, and between the decisions below and the opinions of the Third (*Cohen*) and Fourth (*Short*) Circuits; raises serious questions respecting the administration of criminal justice in the federal courts; and requires the supervisory intervention of this Court.

(B) Section 3 was construed in a manner contrary to the common law, to prior decisions in other circuits, and to the requirements of the Fifth Amendment.

The definition of an accessory after the fact (18 U.S.C.A. 3) is derived from the opinion in *Skelly v. United States,* 76 F.2d 483 (10 Cir.), which in turn is based upon the common law definition of the term.[21] At common law, an accessory to a crime was a party thereto, one who was connected directly therein. Indeed, it was held that the acts of the principal and the accessory were *one continuous transaction* and constituted but a single offense. *Skelly v. United States, supra,* at 487-88; cf. *Nye & Nissen v. United States,* 336 U.S. 619; *United States v. Paglia,* 190 F.2d 445, 447 (2 Cir.); *United States v. Peoni,* 100 F.2d 401 (2 Cir.). Absent this close relationship to the principal crime there was no accessoryship at common law.

It logically follows that when the main crime has been completed by the apprehension and conviction of the principal offender, there is neither a legal nor logical possibility of accessoryship. The criminal transaction has then, perforce, come to an end. Other offenses may thereafter be committed by one who aids the principal, but not the offense of accessoryship.

Thus at common law, aid after conviction of the principal[22] did not constitute accessoryship. Such aid, on the contrary, was classified as "misprision of fel-

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[21]Even prior to the enactment of the statutory definition, federal Courts looked to the common law for the meaning of the term. *United States v. Chapman,* 3 F.Supp. 903 (S.D. Ala.).

[22]With the possible exception of jail break assistance. See *infra.*

ony", or "compounding felony", or "escape", or "prison breach", or "aid to fugitives" (see 2 *Hawkins,* P.C., Section 29; *Halsbury,* Laws of England, 2d ed., Sec. 593-99; *Perkins,* Parties to Crime, 89 Penna. L.R. 581). In all of the briefing in the court below, there was cited not one single case of conviction of accessory after the fact based upon acts of assistance after conviction of the principal. Nor is such a case cited in any of the opinions below.

While the affirming opinion asserts to the contrary, in reliance upon a fragmentary excerpt from a common law writer (231 F.2d at 167; R. 965; App. p. 34), it fails to recognize that what is there referred to, is only "rescue . . . from the lawful confinement . . . " (*Bishop,* Criminal Law [9 ed.], 500-01),[23] and that, except for jail break, not a single case of accessoryship has been found at common law based upon acts of assistance rendered after the conviction of the principal.

The other ground assigned below: that, whatever the common law rule may have been, "Congress had the

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[23]The sentences in *Bishop* immediately following the language quoted by Judge Lemmon are:

> "If a man is committed on a charge of a felony, though only awaiting his trial, *the rescuing of him, or helping him to break prison,* is a distinct felony, equally whether he is guilty or not; when the commitment is on a charge of a misdemeanor, it is, irrespective of the question of guilt, a misdemeanor. Still where the commitment is for a felony, *the rescuer* is also, or may be, an accessory after the fact in it; and as the crime of the accessory is itself a felony, it is immaterial with which form of felony he is charged." (Bishop *Criminal Law,* 9th Ed., Sec. 697, pp. 500-501.)

The two cases cited in *Bishop* at this point, *Rex v. Burridge,* 3 P.Wms. 439, and *Commonwealth v. Miller,* 2 Ashm. 61, each involved aiding a prisoner to escape from custody.

undoubted power to enlarge the definition of accessory after the fact" (231 F.2d at 167; R. 965; App. p. 35), is equally untenable to support the affirmance. Of course Congress had the power, but the question, which is not answered, is, did it exercise it? The "authoritative"[24] reviser's notes show that it did not. On the contrary, there is nothing in the legislative history of the 1948 codification to show that an enlargement of the common law definition of accessoryship was intended. Indeed, that history shows clearly that Congress intended only to codify, not to modify, the existing criminal law of the United States. Hearings before House Committee on the Judiciary on H.R. 1600 and H.R. 2055, 80th Cong., 1st Sess.; Rep. 1620, 80th Cong., 2nd Sess., 94 Cong. R. 7928, 8906. Certainly an intention to "enlarge" the common law definition of accessoryship would have excited some comment during the course of this impressive legislative history. (*Cf. Ex parte Collett*, 337 U.S. 55, 65-72).

(C) The statutes were applied to petitioners despite the absence of evidence of scienter.

1. The harboring counts.

In order to convict petitioners Kremen and Coleman of harboring Steinberg it was necessary for the Government to prove (1) specific "notice and knowledge" on the part of each of them that a federal warrant had been issued for his arrest and (2) that the acts of concealment were for the specific purpose of preventing

[24] *United States v. National City Lines*, 337 U.S. 78, 81; see also, *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 376, n. 12.

that arrest. *Fulbright v. United States,* 91 F.2d 210 (8 Cir.). The evidence totally fails to establish either of these two factors.

While the affirming opinion recites at great length, and thereby emphasizes, the facts relating to the concealment, it nowhere points to any evidence which establishes either directly or inferentially that Kremen and Coleman had the requisite specific knowledge or *scienter.* As the Chief Judge points out in his dissent, there are many reasons why these petitioners may have hidden Steinberg,[24a] apart from knowledge of the existence of a federal warrant or a purpose to frustrate its execution (231 F.2d 179-80; R. 987-88; App. pp. 65-66). The Government's failure to negative these and other possible alternative inferences is fatal to its case. *Fulbright v. United States, supra,* at 213.[25]

2. The accessoryship counts.

With respect to the accessoryship counts the situation is much the same.[26] Clearly, specific knowledge of the principal's offense and of the existence of process for his arrest are equally as essential here as in the harboring situation. Section 3 of Title 18 applies only to persons who "knowing" that an offense has been

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[24a] As a matter of fact, the evidence makes it more likely that Steinberg was concealing Coleman, rather than the reverse.

[25] The Government, but not the affirming opinion, recognized that it had to carry the burden of negativing such inferences. However, for the reasons specified by the Chief Judge, its attempt to carry the burden (or shift it to petitioners) by the drawing of artificial analogies to cases involving stolen property, is impermissible (231 F.2d at 179; R. 987; App. p. 65).

[26] Of course if the arguments made under either sub-points (A) or (B), *supra,* are sustained, the accessoryship counts cannot stand in any event.

committed, engage in the proscribed conduct. Absent such knowledge there is no offense. If "general malevolence" is not enough to make out the offense of harboring (*Fulbright v. United States, supra,* at 212), it can hardly be sufficient to sustain a conviction under Section 3. *Cf. Skelly v. United States,* 76 F.2d 483, 485 (10 Cir.); *Neal v. United States,* 102 F.2d 643, 646 (8 Cir.).

The abortive effort of the Government to prove that petitioner Kremen had in earlier years been a "radical" (R. 836-52) or a subscriber to a certain newspaper (R. 819-35) demonstrates a recognition of the necessity for establishing such knowledge on her part.[27] As to petitioner Kremen, then, the Government totally failed to establish the knowledge required to make out a case under the accessoryship counts (see 231 F.2d at 181; R. 990; App. pp. 69-70). *She presents this as a separate point on her own account.*[28]

As to petitioners Coleman and Steinberg, evidence of their past associations with Thompson in the Communist Party was held to justify an inference that they "knew" of the prior conviction. But such past association is no substitute for the specific knowledge required by the statute. To permit it to be so used is in direct conflict with the holdings of this Court, not only

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[27]We do not concede, of course, that even if it had been admitted, the proferred testimony would have established the requisite knowledge.

[28]She also presents as a separate point on her own account, the Government's failure of proof with respect to her on the harboring counts as well.

Indeed, each petitioner stands before this Court, as to each count, as a separate individual. This applies to the conspiracy as well as to the other counts. *Stack v. Boyle,* 342 U.S. 1, 9.

in *Schneiderman v. United States,* 320 U.S. 118, but also in the more recent cases of *Weiman v. Updegraf,* 344 U.S. 183, and *Slochower v. Board of Higher Education,* 350 U.S. 551. What the statute requires is specific knowledge of a specific conviction and this may not be inferred merely from past associations in an altogether different context.

3. THE CONVICTION OF PETITIONERS ON COUNTS 1 AND 2 OF THE INDICTMENT CANNOT BE SUSTAINED BECAUSE (A) THESE COUNTS DID NOT ALLEGE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES; (B) THERE WAS A FATAL VARIANCE BETWEEN THE PLEADING OF THOMPSON'S CONVICTION AND THE PROOF; AND (C) THE CHARGE WITH RESPECT TO THOMPSON'S CONVICTION WAS ERRONEOUS.

(A) Counts 1 and 2 did not allege facts sufficient to constitute an offense against the United States.

As we have seen, *supra,* pp. 3-4, the indictment charged that Thompson had been convicted of conspiring to organize a society for the overthrow and destruction of the government in violation, it was alleged, "of Sections 2, 3 and 5" of the Smith Act. The cited sections, however, relate, rather, to the organization of societies which "teach, advocate and encourage" the proscribed doctrine.[29]

The omission of the quoted words makes the indictment fatally defective, or at least so confusing as to render it insufficient to support a conviction. An indictment must inform the accused of the nature and cause of the accusation against him, it must set forth

[29]The quoted language is retained in the 1948 codification, 18 U.S.C.A. 2385.

the offense with clarity and certainty, and every ingredient of the offense must be accurately and clearly alleged. *United States v. Cruikshank,* 92 U.S. 542. An indictment which charges an accused with being an accessory after the fact to one crime, and, then, five lines later describes another crime, cannot be said to meet the constitutional test.

It cannot be determined from the indictment whether the charge laid was accessoryship after the fact to a conspiracy *to organize a society for the overthrow of government,* or accessoryship after the fact to a conspiracy *to organize a society to teach that doctrine.* The indictment did not advise petitioners with which of these two offenses they were being charged. Nor is it clear from the indictment to what extent petitioners may plead their convictions here as a bar to future prosecutions for either, both, or neither of these two offenses. An indictment which does not on its face clearly and positively supply the answers to such questions is fatally defective. *Berger v. United States,* 295 U.S. 78; *Bennett v. United States,* 227 U.S. 333; *Neal v. United States,* 102 F.2d 643 (8 Cir.); *Guilbeau v. United States,* 288 F. 731 (5 Cir.).

(B) There was a fatal variance between the pleading of Thompson's conviction and the proof.

If the indictment pleaded any offense, it pleaded accessoryship to the crime of conspiring to organize for the overthrow of government. This was the crime charged specifically and in so many words. In analogous situations it has been held that statutory refer-

ences in an indictment are irrelevant. *Cf. United States v. Hutcheson*, 312 U.S. 219; *Hammer v. United States*, 271 U.S. 620; *Pettway v. United States*, 216 F.2d 106 (6 Cir.); *Holland v. United States*, 209 F.2d 516 (10 Cir.); *Rose v. United States*, 149 F.2d 755 (9 Cir.).

Yet, contrary to what was specifically charged, the proof established, in conformity with the fact (*Dennis v. United States*, 341 U.S. 494), that Thompson was convicted of conspiring to organize a society to "teach and advocate" the proscribed doctrine (Ex. 121; R. 901).

The Government's contention that this variance was only "moderate" (R. 894), cannot be sustained. On the contrary, the difference between a conspiracy to organize to overthrow government and a conspiracy to organize to teach that doctrine is a substantial one. That the variance is material and would be required to be noted by the court (F.R. Crim. P. 52[b]) even if it had not been pointed out by seasonable objection (as it was [R. 894, *et seq.*]), is demonstrated by the fact that the crimes mentioned are separate and distinct, and are so specified in the statutes. Compare 18 U.S.C. 2384, dealing with seditious conspiracy, with 18 U.S.C. 2385, dealing with advocacy of overthrow of government.

Such a variance requires a reversal of the convictions on the first two counts of the indictment upon the ground that the evidence fails to sustain them. In view of the foregoing, the affirmance of the con-

victions below constituted a denial of due process. *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196.

(C) The charge with respect to Thompson's conviction was erroneous.

Despite this state of the record the trial judge charged the jury that "as a matter of law" Thompson had been convicted of "the said crime".[30] The charge was doubly erroneous.

First, it never told the jury what "the said crime" was: conspiracy to organize for overthrow or conspiracy to organize merely to teach. By referring only to the crime "therein described", the charge did not make it clear which of the two crimes described in the first count of the indictment was meant. Such an equivocal instruction requires a reversal of the judgment. *Bollenbach v. United States,* 326 U.S. 607.

Second, the charge was palpably contrary to the record which showed without contradiction that although, at best, the indictment described the crime of conspiracy to organize for overthrow, the proof

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[30]The instruction in full reads as follows:

"Now with reference to that first count of the indictment, let me say to you that you need not examine the facts or the record presented to determine whether or not Robert Thompson committed the crime *therein described,* because I now tell you and instruct you as a matter of law that the record shows that Thompson was convicted of *the said crime* in a United States court, and that judgment was pronounced against him and has become final. Consequently, Thompson did commit the crime of conspiring to teach the overthrow and destruction of the United States by force and violence." (R. 913-14.)

To what does "therein described" refer? To the crime charged or to the crime proven by the record? And what is "the said crime"?

showed a conviction for conspiracy to organize to teach. Thus the instruction that "the record shows" that Thompson was convicted of "the said crime" is incorrect. Thompson was convicted of something quite different from the crime described in the first count of the indictment. It was error not to let the jury examine the record to determine whether the proof (Ex. 121; R. 901) supported the charge made.

With respect to all the foregoing, the affirming opinion said (1) that the defect in the indictment was only "an artificiality in pleading" which could not be "tortured" into reversible error; and (2) that while the charge was admittedly given in "incomplete language", this could not be "magnified", as petitioners sought to do (231 F.2d at 173; R. 976; App. p. 50).[31]

It is submitted that in thus rejecting petitioners' contentions, the court below deprived them of their constitutional rights (1) to have the indictment against them state clearly and unambiguously the facts constituting the offense; (2) to have the proof conform to the charge made; and (3) to have the jury pass upon all the factual issues in the case on the basis of full, complete and unequivocal instructions by the trial Court.

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[31]The affirming opinion also argued that since "the full story" of Thompson's conviction appeared in appellants' briefs there was no merit in this contention (*ibid.*). It is hard to understand how a defect in a record may be remedied by recitals in briefs prepared by counsel who are required to examine and analyze reported Court decisions.

These errors below present serious questions respecting the administration of criminal justice in the federal Courts and require a review by this Court.

CONCLUSION.

For each of the foregoing reasons the writ of certiorari should issue and the judgment below be reversed.

Dated, San Francisco, California,
June 11, 1956.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioners.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,
Of Counsel.

(Appendices Follow.)

Appendices

Table of Contents

	Page
Order of District Court denying petition for the return of seized property	1
Opinions of Court of Appeals:	
Judge Lemmon's affirming opinion	4
Judge Healy's concurring opinion	62
Chief Judge Denman's dissenting opinion	63
Judgment of Court of Appeals	74
Order denying petition for rehearing	75
Constitutional provisions	76
Statutes involved	77

In the United States District Court for the Northern District of California, Southern Division

No. 33,740

United States of America,
Plaintiff,

vs.

Shirley Kremen, aka Lee Kaplan; Patricia Julia Blau, aka Janet Conroy; Carl Edwin Rasi, aka Carl Ross and Robert Newman; Samuel Irving Coleman, aka William B. Gordon; Sidney Steinberg, aka Sid Stein and Joshua Newberg,
Defendants.

ORDER

Defendants have petitioned the Court to order the return of property seized by United States agents while engaged in lawfully arresting defendants. The government agents conducted the search and seizure without first obtaining a search warrant. The United States moved to have the Court strike the Motion to Return on the ground that it did not state enough facts to establish a basis for relief. Defendants' motion is supported only by one affidavit filed and signed

by defendant Sidney Steinberg on behalf of himself and defendants Kremen, Rasi and Coleman. Affiant does not allege that he owned or otherwise lawfully occupied the premises searched; nor does he identify the items of property seized, if any, which he, rather than the other defendants or third parties, owned or had in his possession.

It is elementary that the Fourth Amendment may be invoked only by one whose rights are violated. Accordingly, defendant Steinberg may complain of a search and seizure only if his abode was searched and his property seized. United States v. Jeffers, 342 U.S. 48 (1951). Moreover, the Court is unwilling to accept an affidavit made by defendant Steinberg in support of alleged Constitutional violations suffered by the other defendants.

Defendants, in support of their motion, rely strongly upon the case of United States v. Lerner, 100 F.Supp. 765 (1951) decided by this Court. Their reliance is misplaced. That case is distinguishable. It arose on a motion to suppress certain evidence. The Court there had the benefit of testimony, rather than mere affidavits, which established that Lerner was the sole, lawful tenant of the premises searched and that the property seized was in Lerner's possession. If the search was unlawful, therefore, Lerner was the one entitled to complain.

Defendants' counsel moreover contends that the defendants cannot make the requisite showing because the Government has in its possession the only list of property seized in the course of making the arrest.

There is some merit in that contention. The Federal Bureau of Investigation, the seizing agency, made a detailed summary of the property seized. Upon the Government's admission that the summary contained no information, the divulgence of which would endanger the security of the United States, the Court is of the view that the summary should be made available to defendants in order to refresh their recollection should they choose to renew this motion buttressed by a proper showing.

The Court expresses no opinion at this juncture as to the legality of the search and seizure nor whether a Motion to Return could in a case like this be considered by the Court upon mere affidavits rather than upon evidence.

Defendants' motion is denied. The Government's motion is granted. Defendants may, upon demand, have a copy of the summarized list of items seized, consisting of twenty-five (25) pages, which was sent to the United States Attorney for the Northern District of California with a cover sheet bearing the date of February 8, 1954 and the signature of William M. Whelan, Special Agent in Charge.

So Ordered.

Dated, February 9th, 1954.

/s/ Edward P. Murphy,
United States District Judge.

United States Court of Appeals
for the Ninth Circuit

Shirley Kremen, Carl Ross, Samuel Irving Coleman, and Sidney Steinberg, Appellants, vs. United States of America, Appellee.	No. 14,359 Jan. 20, 1956

Appeals from the United States District Court for the Northern District of California, Southern Division

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Before DENMAN, Chief Judge, and HEALY and LEMMON, Circuit Judges.

LEMMON, Circuit Judge.

A depressing tale of lies, disguises and aliases resorted to by a group of seasoned subversives, referred to by their own attorneys as "these Communists", is unfolded by the record in this case.

It is a tale of how a handful of Reds sought to shield a convicted member of their group from condign punishment.

It is a tale of the devious practices to which they resorted in their almost successful efforts to cheat the law.

It is, finally, a tale of how their deceptions and their subterfuges were frustrated at last by the patient labors of Federal "Cossacks", as officers of the law are sometimes contemptuously called by the Reds.

With regard to the means used by "the Communists" to help a pair of their leaders to thwart justice, it is naive indeed to expect to find them hiding in alleys, sulking in twilight corners, turning up their coat collars, or pulling their hats down over their eyes.

No; the hard-core members are far too adroit and well-instructed for such amateurish cloak-and-dagger technique. They select a quiet village, rent a cabin, and then, wearing shorts, play ping-pong in their front yard. Or they add touching domestic notes, hanging up the family wash or buying groceries at the village store.

1. *The Indictment*

The indictment was in four counts. The first count alleged that on October 14, 1949, Robert G. Thompson was convicted in New York for conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government by force and violence in violation of Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act. (18 USCA, 1940 ed., Secs. 10, 11, 13; 18 USCA Sec. 2385, 1948 revision)

It was further averred that on August 27, 1953, near Twain Harte, Tuolumne County, California, the appellants,[1] knowing that Thompson had been convicted of the above offense, "did receive, relieve, comfort and assist" him "in order to hinder and prevent his apprehension and punishment". This count was brought under 18 USCA Sec. 3, infra.

The second count charged that the appellants *conspired* to commit the offense charged in Count 1, and seven overt acts were set forth. 18 USCA Sec. 371.

The third count alleged that on August 27, 1953, the appellants Kremen, Coleman, and Rasi, also known as Ross, knowing that a warrant had been issued for the apprehension of the appellant Sid Stein, also known as Sidney Steinberg, harbored and concealed him so as to prevent his discovery and arrest, a warrant for his arrest having been issued by the United States District Court for the Southern District of New York. 18 USCA 1071.

The fourth count stated that the three appellants named in the third count conspired with each other, with Thompson, and with divers other persons to harbor and conceal Steinberg "so as to prevent his discovery and arrest", while those three appellants knew that a warrant for the arrest of Steinberg, under the name of Sid Stein, had been issued by the above-mentioned Court in New York on June 20, 1951. Thompson was named in this fourth count as a "co-

[1]Patricia Julia Blau was also named as a defendant in the indictment. Since the District Court granted a motion to dismiss her from the case, she does not figure in this appeal.

conspirator but not as a defendant". Six overt acts were alleged. 18 USCA Sec. 371.

2. *Statement of the Case*

Motions to dismiss, for discovery and inspection, for a bill of particulars, for the issuance of pretrial subpoenas, and for a return of property seized in the raid and its suppression as evidence were made by the appellants and were denied. The District Court did, however, rule that the appellants might, on demand, have a copy of the summarized list of items seized. Such a copy was furnished them, *infra*.

After a trial starting on April 12, 1954, and lasting two weeks, during which the appellants offered no evidence, each appellant was found guilty on all counts in which he or she was charged. Judgments of imprisonment were pronounced upon all of the appellants, from which judgments the present appeals were taken.

3. *The Appellants' Attacks Upon the Judgments of Conviction*

The following errors are asserted to have been committed by the court below, in the order in which they are discussed in the six subdivisions of the appellants' opening brief, and in the order in which they will be considered herein:

1. Sections 3 and 371 of 18 USCA were construed and applied under the first and second counts of the indictment in a manner violative of the due process guarantees of the Fifth Amendment.

2. The search and seizure were unlawful and it was error to deny the motions to suppress.

3. The evidence is insufficient to sustain the conviction against any of the appellants.

4. The first and second counts of the indictment do not state any offense against the United States since they do not charge Thompson with a violation of the Smith Act.

5. The trial court erred in instructing the jury.

6. The trial court erred in failing to instruct the jury as requested by the appellants.

4. *The Applicable Statutes*

As we have noted in our summary of the indictment, the charges are based upon three sections of 18 USCA, as follows:

> *"Sec. 3. Accessory after the fact*
>
> "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.
>
> "Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

"Sec. 371. Conspiring to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

"Sec. 1071. Concealing person from arrest

"Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined not more than $1,000 or imprisoned not more than six months, or both."

5. *Testimony in Connection With the Motion to Suppress Evidence*

Because of the appellants' contention that there was insufficient evidence to justify the arrests, the seizures, or the subsequent verdicts of guilty, we are attempting to give in the following two sections somewhat full summaries of the relevant testimony.

William H. Whelan, an agent of the Federal Bureau of Investigation, was in charge of the fifteen agents and the matron who participated in the arrests that took place at a certain house and its environs near the village of Twain Harte, on August 27, 1953, at 1:05 p. m.

The house, referred to in the record as a "cabin", was a two-story structure with a small porch on one side of it. It was on a "secondary" road, with a driveway leading from the road to the cabin itself.

The arresting party arrived in six automobiles, which drove up the roadway to the front of the house. Thompson and Steinberg were standing out in the yard. Whelan announced that he and his party were agents of the F.B.I., and that they were there to arrest them. He called upon the pair to surrender.

Thompson and Steinberg put up their hands. Agent Whelan directed them to go over to two trees in the yard, and ordered some other agents to take charge of them and search them. The two prisoners were handcuffed and were permitted to sit on the ground beside one of the trees.

Whelan testified that at that time he "advised them (Thompson and Steinberg) that they were being arrested because of the warrants that were outstanding for the arrest of both of them in the Southern District of New York". He then directed the other agents to go into the house and he followed them inside. There the three persons were ordered to come outside. The men were searched, handcuffed, and

seated. The young woman was searched with the help of the matron, and then was seated on a chair by the porch. Elsewhere the record indicates that Mrs. Kremen was not handcuffed.

The three prisoners who had been brought out of the house were "advised that they were being arrested by virtue of the fact that they were harboring" the two persons for whom the officers "had warrants outstanding". They were all handcuffed and searched.

The three prisoners taken from inside the house were the appellants Ross, Kremen, and Coleman. Steinberg, who was arrested outside the house, is the fourth appellant. Thompson, it will be remembered, was not made a defendant in the instant case.

The five prisoners were fingerprinted and photographed on the spot. Then they were told that they would be taken in without any more delay than was necessary, to be arraigned. In view of the fact that they would be transported to San Francisco, they were given the opportunity to pick up clothing or other articles that they might wish to take along on the trip. Each was taken to San Francisco in a separate automobile and all were arraigned in that city later the same evening.

Back in Twain Harte, the search "was completed that afternoon". Whelan had given orders that, with the exception of items of furniture, all personal property was to be taken.[2]

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[2]Later, at the trial, Roy L. Erickson, a special agent for the F.B.I., testified that "Everything was removed except that which the realtor handling the house identified as the property belonging to him."

It was conceded that no search warrant was ever obtained. The officers were not looking for anything in particular—they were searching for "weapons, . . . contraband or anything that would be a fruit of the crime or a part of the crime". A document of 25 pages, entitled "Personal Property and Papers", which was a list of articles seized at the cabin, was introduced in evidence by the appellants. The list was prepared under Whelan's supervision.

Whelan testified that he made the decision to arrest the five persons at the cabin. This decision, made "in consultation", was that, "if a known fugitive is there, if there are others there that it can be said could be a part of the harboring process, then the others should be taken too."

The agent's weapons were drawn and directed at the appellants at the time of the arrest. The appellants "were asked for permission to allow the search to be made", but "they said nothing".

The appellants were wearing "play clothes" or "sun clothes", and there was some laundry on the line. "The whole house looked like it was lived in. There were two cars there, . . . There was food in the house."

Thompson and the appellant Steinberg were "recognized", and Agent Whelan had them "under surveillance" while they were in the yard talking together.

Whelan's first information that Kremen and her companions were at those premises was received on

the afternoon preceding the raid, but he "knew it for sure that morning" within an hour or so before the arrests—at least so far as Kremen, Thompson, and Steinberg were concerned.

On cross-examination, the attorney for the appellee brought out the fact that F.B.I. agents had gone to the vicinity of the cabin "some time prior to the arrest", and that on the day of the raid "the first group were in the vicinity of the cabin around 6:00 a. m." Whelan himself appeared at the scene "just at the time of the arrest", but "was in contact with them by radio" from 6 a.m. until the time at which he himself appeared. The other agents reported to him "to identify persons as they came out or went in and to name them if he could."

Mrs. Thelma L. Germany testified that she and her husband owned the cabin in question and rented it that summer through "Jimmy" Morrow, a real estate broker.

Morrow, next called as a witness, stated that a "Mrs. Lee Kaplan" had approached him, expressing a desire to rent a cabin "that was secluded and quiet because her brother was ill with nerves and she wanted to be where they would be by themselves." "Mrs. Kaplan" rented the cabin in question and paid the rental monthly in advance. Morrow identified the appellant Kremen as the person who had rented the cabin. The rent was to start on June 26, 1953.

In connection with the motion to return sei property, *supra*, Agent Whelan testified that "t

automobiles"[3] were returned. "They had a registered name on it and they were returned. *We never found out to this day who wants any of the rest of this property.*" The appellee's attorney stated in open court that "The automobiles were registered to people other than these defendants and we returned them."

6. *The Testimony at the Trial*

(a) *The Reconnaissance*

Special Agent Erickson testified that on the day of the arrests he arrived in the area of the cabin at 5 a. m. He and four other agents hid behind boulders or trees on a hill above the cabin. He was in the area above the road and sometimes on the road itself. Erickson was able to observe an outhouse, *infra,* at all times. He was about 100 feet from the cabin, and remained at his station until about 1:04 p. m.

At 9:30 a. m. a man emerged from the entrance of the cabin. The witness saw this man later in the day. The following morning, the man identified himself to Erickson in Alcatraz Penitentiary as Robert Thompson. Erickson also identified Thompson from colored and black-and-white photographs, hereinafter sometimes referred to as "Exhibit 2" and "Exhibit 3", respectively.

Thompson came out of the cabin with a fly fishing rod and practiced casting for about ten minutes. He

[3] Testimony at the trial showed that there were *two* automobiles near the cabin, in the parking area. One was a light green Chevrolet and the other a 1950 bronze-colored Ford.

then laid the rod on a small table in the yard and returned to the cabin.

At about 9:45 a. m. a woman came out of the cabin and sat in an armchair near the entrance. She appeared to be writing or drawing. Erickson identified the woman as the appellant Kremen. She sat in the chair for about 15 minutes and then returned to the cabin.

While Mrs. Kremen was sitting in the chair, a man dressed only in a pair of brown trousers came out of the cabin. He sat on the ground off of the lowest terrace right by the entrance from which he and the other two had emerged. He remained there for a few minutes and went back in at about the same time that Mrs. Kremen re-entered the cabin. The witness identified that man as the appellant Carl Ross.

Mrs. Kremen re-emerged at about a quarter past ten, carrying what was apparently washed clothing, which she hung on a line stretched to the outhouse from the corner of the cabin nearest to the entrance. She immediately returned to the cabin. The clothing was a man's, and there was "some type of a towel".

At about 10:30 another man came out of the cabin, walked around the yard briefly, and returned. He was dressed in only a pair of yellow swimming trunks or shorts. He was identified by Erickson as the appellant Coleman.

All the four above-mentioned individuals kept walking in and out of the cabin several times. "I did not keep an accurate record of their exits and entrances."

At about noon, a fifth person came out of the cabin. He too was dressed only in a pair of trousers. Erickson identified that man as the appellant Steinberg. The latter pulled a chair up to the table and sat there, apparently writing or drawing, Erickson testified. After 15 or 20 minutes, Steinberg got up and went ck into the house.

At about five minutes after 1 p. m., Thompson and Steinberg were together in the yard. Immediately before that time, all five occupants of the cabin had been sitting in the yard around the table. They appeared to be talking.

Just before 1:05, the other three returned to the house.

At about 12:45, Erickson had received certain instructions from his superior. Pursuant to those instructions he had been relaying the information that he and four agents were "observing" to an agent in charge of the operation. Those instructions were passed along by means of a two-way radio, or "handi-talkie".

"We had been observing the people through binoculars and relaying the details as we observed them," Erickson testified. "About 12:30 we relayed the information that, to our satisfaction, two of the . . . people . . . were . . . fugitives . . ."

"About 12:45 we received instructions to stand by, not to move, but to be prepared to assist approaching party, which was approaching by automobile. We were told that there would be an arrest effected, that

we would have to take the two who were there that we were satisfied were fugitives in our minds. We were told that we should also be prepared and that we would effect an arrest of all the parties there, . . ."

When the automobiles were seen coming into the entrance driveway, the officers were instructed to leave their cover positions on the upper road and on the wooded hillside and move down to the cleared area "and assist in effecting the arrest of the people of the cabin."

The F.B.I. converged upon the cabin at 1:04 p. m.

(b) *The Attack*

When he observed the F.B.I. automobiles coming up the driveway, Agent Erickson dropped his handi-talki and came down the wooded hillside to the parking area.

When the first car arrived, the agent in charge jumped out and "issued the command to everyone present that we were agents of the F.B.I. and that those on the premises were under arrest." The three appellants who were inside—Kremen, Ross, and Coleman—"were removed to the outside" to join Thompson and the appellant Steinberg.

Individual agents "assumed charge of the prisoners independently," according to Erickson. He personally took charge of Ross, searching and handcuffing him.

When all of the five persons had thus submitted to arrest, the agent in charge announced that there were

warrants for Thompson and Steinberg, and that the officers would have to hold the others on charges of harboring.

One of the documents taken from the appellant Ross has the cryptic flavor of which American Communists are so fond:

"8/24

"Dear Jim:

"Enclosed is note to my Betty. In open envelope is some material which (I?) have written. If you care to read and comment, you are welcome. Please seal before you send off.

"The person on this end of arrangement is being instructed to break off with your lady until he makes certain other arrangements. As previously agreed, contact from your end to be with S, with whom we are in contact. S will explain further and make necessary further arrangements.

"Regards,

"Jess"

Erickson made a thorough search of the house, which gave plain evidence of having been lived in. There was food on the two stoves, on the cabinet above the sink, in the refrigerator. There were two typewriters, a radio and a television set. Clothes were on the floor. There were brief cases and boxes filled with documents of all kinds. There also were papers in the two automobiles.

After reporting the results of his search to his superior officer, Agent Erickson was told to take the

material back to San Francisco. The first search through the material was made at the house. He placed the boxes, suitcases, and the material from the two automobiles in a car that was provided for him, and went back to San Francisco with them, for a more detailed study. The appellants emphasize this taking for further study. There was nothing unlawful in this.

Before Erickson departed, the special agent in charge asked the appellants whether any of them would identify any of the material that was theirs. They all stood mute. The agent pointed out to them that up until that moment it was their privilege to say nothing. He asked them again whether they would identify anything there, or specify "anything they wanted us to take care of". The appellants remained mute. At no time did any of them tell him what was theirs. They now can hardly clamor for the return of property to which they laid no claim when they had ample opportunity to do so.

Agent Erickson identified a great mass of material taken in the raid. On cross-examination, he testified that while the officers were satisfied, from their observations through binoculars and their examinations of photographs, that two of the occupants of the cabin were fugitives, one of the agents, Joseph McCann, had previously seen the pair in person. He was sure that this was true as to Steinberg, and believed that it applied also to the other. McCann himself later testified that he had known Steinberg since November, 1950, and that he had "observed" Thompson on "numerous occasions" in New York.

Agent McCann, stationed in New York, testified that when he first saw Steinberg in November, 1950, Steinberg weighed about 165 pounds, with "a full face and a heavy build." His hair was long and black. He was about five feet six inches in height, and had a light and shallow complexion. When he saw him on the day of the raid, Steinberg weighed about 125 or 130 pounds, his hair was cut short, he was much thinner in face and body, and he had grown a mustache.

When Agent McCann "observed" Thompson in New York in 1949 and 1950, the latter was about five feet ten inches in height, weighed about 180 or 190 pounds, had *long brown* hair, and had a fairly stocky build. On the day of the raid, Thompson weighed 210 or 220 pounds, his hair was *red*—apparently dyed—and was cut *short*. He wore a *light strawberry blond mustache*. His eyebrows were *strawberry blond* also. He was very stocky in appearance, and "had a very large stomach."

A wallet was pointed out by Steinberg as belonging to him, McCann said. It contained a California Citizens Angling license, three business cards, a Social Security card, and six rent receipts. All these documents contained the name "Josh Newberg" or "Joshua Newberg". McCann testified that in his search of Steinberg's person and wallet *he found no material bearing the name "Sidney Steinberg"*. Special Agent Erickson had previously identified a Resident Citizen Fishing License, a Social Security card, and five business cards as having been found in the cabin. They likewise bore the name "Josh Newberg" or "Joshua Newberg".

Agent McCann testified that on June 20, 1951, he had a warrant of arrest to serve on Steinberg; that he first attempted to serve it on that day, at Steinberg's residence; that he was not able to serve the warrant; and that Steinberg "had not been seen" by McCann since that time, until the encounter at Twain Harte.

Glenn A. Harter, a special agent of the F.B.I., stationed at San Francisco, said that he examined the contents of Mrs. Kremen's purse at the time of the raid. Among those contents were a library card in the name of Lee Kaplan, another library card in the name of Richard Kaplan, a California resident citizen's angling license in the name of Lee Kaplan, a free campfire permit in the name of Mrs. Lee Kaplan, a Social Security card in the name of Lee Kaplan, a California Motor Vehicle Operator's License in the name of Lee Lefko Kaplan, a Pacific Gas & Electric Company bill issued to R. Kaplan; a San Jose Water Works bill bearing the name Richard R. Kaplan; and "a document saying that 'this is your invoice' to . . . Mr. Richard Kaplan . . ." Agent Harter testified the Kremen material that he examined did not reflect the name of Shirley Kremen or Mrs. Irving Kremen.

Special Agent Joseph T. Daly testified that he was at the cabin on the day of the raid and again on September 2, 1953. On the latter date, he examined ten garbage cans in a garbage container inside of the outhouse, dusting them for fingerprints. He placed scotch tape over the "latent" fingerprints that he found, and sent the cans that contained fingerprints to Agent Clark in San Francisco. He identified ten Budweiser

beer cans as being in the garbage cans to which he referred.

Senior Plant Quarantine Inspector Henry James Warren, of the California Department of Agriculture, stationed at Dorris, California, produced a page from his records showing that an automobile bearing the Missouri license number C-54-274, had entered the State of California at Dorris on August 20, 1953.

Frank J. Smith, special agent for the F.B.I. at New York, said that he had known Thompson from 1949 to the time of the trial, and that the latter's appearance on August 27, 1953, when Smith arrested him, was "not at all" the way he looked four years before. In 1949 Thompson had dark brown hair, which he wore much longer than at the time of his arrest. When picked up at Twain Harte, at which time Thompson's picture was taken, he had a "crew cut", his hair was dyed red, he wore a reddish mustache, and his eyebrows were red. His complexion was "a brown".

"When I knew him in the past", Agent Smith continued, "he had an apparently sallow complexion. He wasn't the color he was at the time we saw him.

"He weighed about 41 pounds heavier on August 27, 1953, than he had when I saw him prior to that, which was about May 1st, 1951. He had a definite stomach, quite a large stomach, which he didn't have before. He was a husky built fellow, but he was quite fat in this picture here."

Between the time that he first saw Thompson and May, 1951, Smith testified that he "must have seen

Thompson several hundred times". He saw Thompson at the Communist Party headquarters, and at about the time of the trial in New York.

At first Thompson wouldn't say anything to him, Smith testified. When fingerprinted, Thompson denied his identity, but would not "talk about who he was". In a coat that belonged to a suit that Thompson admitted was his, there was found a certificate of birth stating that "John Francis Brennan" was born in New York on April 9, 1909.

Another exhibit was a book containing a $100 initiation stamp and certifying that "Brennan" had been granted membership in the International Association of Bridge Structural and Ornamental Iron Workers, affiliated with the American Federation of Labor.

Smith also identified a wallet found in the khaki trousers that Thompson was wearing. A sheaf of papers found inside the wallet was also introduced in evidence. These papers bore the name of "John Brennan" or that of "Linda Corsia Brennan." Smith testified that "there was nothing in his wallet or on his person with the name of Robert G. Thompson at all."

Later, in San Francisco, Thompson admitted to Smith that the wallet and the papers in it were his. He finally said to Smith, "Well, I guess you know who I am," and signed a "listing" of the money, the wallet, and a penknife that had been taken from him. He signed as "Robert Thompson".

Albert B. Ground, a fingerprint examiner for the F.B.I., with headquarters in Washington, was the next witness. He testified that he had examined "approximately 5,000,000" of the 130,000,000 fingerprints in the F.B.I. files. He said that he had examined the ten Budweiser beer cans already referred to, and had found thereon the fingerprints of each of the four appellants, as well as that of the alleged co-conspirator Thompson.

John Lautner, a consultant with the Department of Justice, testified that for twenty years prior to January, 1950, except for the time when he was in the Army, he had been employed as a functionary of the Communist Party. When the appellee's attorney sought to inquire as to Lautner's specific function in the Party, counsel for the appellants objected that there was "no foundation". The answer of the District Judge was so apposite to many other similar objections by defense counsel that it bears quoting here:

> ". . . *counsel can't put in all the evidence in one instant of time.*"

Lautner had been head of the New York State Review Commission, security officer of the New York Organization, and a member of the National Review Commission, all of the Communist Party. He testified that he was acquainted with the appellants Ross, Coleman, and "Stein" (Steinberg).

Lautner knew Steinberg from 1948 up to the time that the former left the Party, on January 17, 1950. Steinberg's New York office was at the Communist

Party headquarters, in the same building where Lautner himself had had his offices.

Thompson had his headquarters in the "national office" of the Communist Party from about 1944 to the time that Lautner left the Party.

Coleman had his offices there from May, 1947, up to the summer of 1949, when Lautner himself acquired an office in the building. He saw Coleman in the presence of Thompson many times, from the summer of 1947 up to the end of 1949, at the state headquarters of the Party. He also saw them at the Party's state convention, at Webster Hall, New York.

The witness said that he had seen Steinberg and Ross in the presence of Thompson, and that he had seen Steinberg in the presence of Ross at the 1948 national convention of the Party. Coleman was present at the state convention. Thompson was present at both conventions.

In connection with his duties in the Communist Party, Lautner had occasion to work with Coleman, Steinberg, and Thompson.

Thompson, as state chairman of the Communist Party, was Lautner's superior in the New York State organization, and also as member of the National Committee Thompson was his superior officer. This was their status from 1945 to December, 1950.

Lautner and the appellant Coleman were both members of the New York State Organization Commission, Coleman being a member of the educational department and head of the review commission. This party

relationship of the two men continued from May, 1947, to about the middle of 1949.

Burnett Britton, another F.B.I. special agent, testified that he visited the area of the Twain Harte cabin at 2:35 p. m. on August 26, 1953—the day before the raid. His car came to about five yards of the cabin and stopped. He saw Mrs. Kremen standing at the door, while two men, whom he identified as Coleman and Thompson, were playing Ping-pong at a table in the parking area south of the cabin. Thompson was again described as having "strawberry blond" hair.

Britton said that he noticed a light-green Chevrolet coupe in the parking area. Latter that day, at 4:15 p. m., he saw Mrs. Kremen driving the same automobile "extremely slowly" in the main thoroughfare of Sonora, California, which is about fourteen miles from the village of Twain Harte.

At midnight of the same day, Britton again visited the cabin premises, and again at 3 a. m., the following day, August 27, and, finally, with the raiding party at 1:05 p. m. At that final visit, he observed two automobiles at the cabin, one of them being the 1950 green Chevrolet coupe.

On cross-examination, Britton stated that on his visit to the cabin premises in the afternoon of August 26, the car in which he was riding was being driven by Robert Summers, an employee of the Pacific Gas & Electric Company, whom Agent Britton had picked up at Sonora three-quarters of an hour before. The automobile stopped at the entrance of the house for about three minutes. Britton remained in the car, but

Summers approached Mrs. Kremen. After three minutes Summers returned to the car, and the two men drove off.

Woodrow Walton, a salesman for a Hudson automobile agency at St. Louis, Missouri, testified that he sold a Hudson to a man who he identified as Samuel Coleman, one of the appellants, on June 5, 1953. Coleman traded in an Olds automobile, signing the necessary papers with the name "William B. Gordon". Coleman kept the license number of his old car and used it on his new Hudson, which is in accordance with Missouri practice. The license number was C54274.

Walter C. Donner, of Camdenton, Missouri, owner and operator of a motel and cottages, identified Coleman as a man who stayed at one of his cottages for two days during the Memorial Day weekend in 1953. Coleman was accompanied by one man and two women. At this juncture counsel for the appellants again objected and the Court, as we have noticed before, remarked, "He has to start somewhere." Counsel for the appellee withdrew his question about the gender of the party, but a moment later developed the information that one of the persons with Coleman was a man, and that there were three persons with him altogether. Donner testified that he arranged for a boat for Coleman, who returned on July 4 and 5 with his same party and took a cabin there again for two days.

Odie E. Meyers, operator of "a fishing dock or boat resort" at Camdenton, testified that a man whom he identified as Coleman accompanied by a "lady" came

to the Meyers dock during the Memorial Day weekend and made reservations for two boats for the July 4 holiday.

During the July 4 holiday four persons were in the Coleman party. Coleman used the name "Gordon". The man with him had hair with a "grayish reddish cast". Meyers identified the two photographs of Thompson as being pictures of the man he saw with Coleman at the boat dock. Coleman and Thompson were together at the boat dock during the three days that the party was there.

Some time after the visits of the Coleman party, some F.B.I. agents asked for the boat resort's registrations "for that particular day", or the July 4 holidays. The Government men came back and forth to the dock on as many as ten occasions, each time bringing photographs that Meyers and his wife were asked to identify as being of persons who had been there.

The first time that Thompson's picture was in a group photograph that was shown to Meyers and his wife, they "selected it", Meyers testified. The couple picked out "only two photographs altogether"—Coleman's and Thompson's. The first time the officers visited the fishing dock, Mr. and Mrs. Meyers were shown a photograph of "Gordon" (Coleman), and "the next time they brought back those photographs, why, he had apparently been apprehended and the photo was in cuffs." During the various visits, the officers showed the couple about four or five different photographs of Thompson and they "picked (him)

out each time". Defense counsel himself brought out, on cross-examination, that Meyers "did not know before (he) got on the witness stand" that he was going to be asked to identify Exhibits 2 and 3.

Harold G. Anderson, a merchant of Bigfork, Montana, with authority to issue Montana fishing licenses, identified Exhibits 2 and 3 as being photographs of a man that represented himself as being "J. F. Brennan" and to whom a fishing license was issued, on August 10, 1953. A person giving the name "Linda Brennan" was present at the time.

E. M. Spencer, owner of some cabins near Polson, Montana, about thirty miles from Bigfork, identified Exhibits 2 and 3—the Thompson photographs—as being photographs of "J. F. Brennan", a "heavy-set man" with "pink colored hair", who stopped to fish at one of Spencer's cabins for the week commencing August 10, 1953. "Brennan" was accompanied by the appellant Coleman and some other persons. The party arrived at Spencer's property in a light blue Hudson automobile bearing a Missouri license. Spencer's record of the transaction showed "Brennan's" as being St. Louis.

Dr. Isaac Rosenstein, of Brooklyn, New York, said on the stand that Coleman in 1949 occupied one of Dr. Rosenstein's apartments on East Broadway in New York. So far as the doctor knew, Coleman still occupied the apartment, together with Mrs. Coleman and their two children, although the witness had not seen Coleman himself on the premises for "several years" prior to November, 1953.

Mrs. Audrey Hanson, of Minneapolis, Minnesota, said that the appellant Ross, Mrs. Ross, and their daughter, had resided next door to her since about 1946, but that in the latter part of 1950 Ross "had moved away", and she had not seen him until "he was captured in California" in the fall of 1953.

James Morrow, the Twain Harte real estate broker that, as we have seen, was a witness at the hearing of the motion to suppress evidence, testified at greater length at the trial itself. He went into some detail concerning the lies that the appellant Kremen told him regarding her reasons for wanting to rent the cabin in question. He said that Mrs. Kremen, who represented herself to him as being "Mrs. Lee Kaplan", stated that her "brother" was "sick with nerves", that he was a "musician", and that she liked the cabin because "there was a stream there and it was very quiet".

The appellant Kremen's story to Morrow was false, from beginning to end. She used an assumed name. She was not renting the cabin for a sick brother, who was a musician. She did want "a spot where it would be quiet and rather secluded". She did not want it, however, for a nervous brother, but for a brace of "nervous" fugitives!

Apparently realizing that Morrow's testimony was damaging, especially to the appellant Kremen, counsel for the defense conducted a lengthy cross-examination, covering 30 pages of the printed record, although the direct examination required only eight pages. The District Judge recognized that the cross-examination

had "come to the point of badgering", and gave defense counsel five additional minutes in which to complete his questioning.

Charles E. Germany, owner of the cabin in question, said on the stand that the appellant Steinberg introduced himself to the witness as "Newberg" and presented the appellant Kremen as "his sister". On the occasion of Mr. and Mrs. Germany's visit to the cabin, the appellant Kremen was "dusting the furniture or something around the house".

After leaving the cabin, Mr. and Mrs. Germany visited some neighbors. When they returned to their car, they saw Steinberg and Kremen playing Ping-pong.

About a month later, Germany alone visited the cabin again to collect the light bill. He saw an "extra man" there at that time. Steinberg, who seemed to act as the master of the household, introduced the man as a "buddy" of his, and motioned to Kremen to pay Germany for the light bill. She obeyed. Ross was identified by Germany as the "extra man" he saw at the cabin at that time.

Mrs. Ruth Lackey, who helps her husband in their general store in Twain Harte, "very definitely" identified Mrs. Kremen as a shopper in the store, "buying a fairly large order". She also identified the appellant Steinberg, but remarked, that "he didn't look like he does now. He had a mustache."

Mrs. Roger Butler, whose husband is an electrical contractor, said that Mrs. Kremen came to her house to get Butler to repair the cabin pump, since "They

had no water in the house". Mrs. Kremen gave Mrs. Butler two keys and asked the latter to have her husband come out to do the repair job. Ten or fifteen minutes later, Kremen went back to the house and asked for the keys back. "She thought she might fix the pump herself", but according to Mrs. Butler, "She said she wanted him to come out when he arrived". Apparently Mrs. Kremen thought better of turning over the keys to the Communist hideout, even to an electrical repairman!

Butler himself then took the stand and identified Mrs. Kremen as being present when he did some work at the cabin in August, 1953.

Dorothy Henrichsen, co-proprietor with her husband of a sports shop in Twain Harte, said that the appellants Kremen and Steinberg visited the shop in June or July, 1953, in company with "another gentleman". In identifying Steinberg, the witness, like Mrs. Lackey, remarked that "he had a moustache at the time".

The trio came in to buy a pair of swim trunks "for a friend that was ill at the time". The witness said that she tried to discourage them from taking the trunks "without the party being able to try them on, because there is no return or refund on swimming clothes". She described the second male customer as "tall, rather obese, (with) very ickey red hair and moustache, and . . . (not) a bit good looking". From Exhibits 2 and 3, the witness identified the second customer as Thompson.

Later, Mrs. Kremen went back to the store to return the trunks "because they wouldn't fit". Mrs. Henrichsen "wouldn't exchange them or give her her money back, and so she didn't care much for me after that. She went to my husband after that."

On cross-examination, Mrs. Henrichsen said that she also saw Coleman with Thompson, on the street. In other words, she saw Kremen, Steinberg, Coleman, and Thompson on the streets of Twain Harte.

The Henrichsens ordered Ping-pong balls for Mrs. Kremen, but they arrived after the appellants' arrest.

Glenn F. Ellis, of Danville, California, employed in a stationery firm of Oakland, California, identified the appellant Ross as the purchaser of a duplicating machine and supplies on June 28, 1953, at the Oakland shop. Ross used the name "Newman" on that occasion, Ellis said. Two invoices, exhibits in the case, covering Ross's purchases, referred to him as "R. E. Newman", and gave his address as "201 Oak Street, Redding".

Harry L. Sotzien, a butcher in Lackey's grocery store, supra, testified that he filled an order for sour cream and frequent orders for "good cuts" of meat —the "best" he had—from a woman he identified as the appellant Kremen, in the summer of 1953. Some of the orders were of "great size", the meat purchases "ranging from four to twelve or fifteen dollars". Mrs. Kremen was the only purchaser of sour cream during that time, and it had to be ordered especially for her.

Phillip J. Moody, owner of a Shell service station at Santa Cruz, California, identified a "lubrication chart" showing that a 1950 five-passenger "metallic brown" Ford tudor coupe had been brought in on August 16, 1953, and identified the appellant Kremen —"The lady in red"—as the one that had brought in the car for servicing.

7. *Sections 3 and 371 of Title 18 Were Not Construed or Applied By the Court Below in a Manner Violative of the Due Process Guarantees of the Fifth Amendment.*

In their very first and basic statement with regard to the District Court's construction and application of the Fifth Amendment of the Constitution, the appellants have fallen into palpable error. They assert that "The crime of accessory after the fact, after conviction of the principal, was not recognized at common law".

In Bishop on Criminal law, 9th ed., twice cited as an authority by the appellants, we find the following statement in Volume 1, Sec. 697, pages 500-501:

> "One mode of helping a felon is to rescue him from the lawful confinement, *either before or after his conviction;* and the rescuer may be indicted for the substantive offense of rescue, *or for being an accessory after the fact in the other's felony, at the election of the prosecutor.* The theory on which the prosecution proceeds differs a little in two forms, but not essentially." (Emphasis supplied)

But even if such had not been the rule under the common law, Congress had the undoubted power to enlarge the definition of accessory after the fact.

Accordingly, the argument of the appellants that "Section 3 was not intended to be applied in instances where the aid was rendered after conviction" is wholly without merit.

Nor can we agree with their contention that "Evidence is wholly lacking of the existence of two separate and distinct agreements (one to "assist" Thompson and the other to "harbor" Steinberg)," or that "If there was any conspiracy at all in this case, which appellants stoutly deny, it was a single conspiracy to aid fugitives who were Communists."

From our careful study of the evidence, which has been fully outlined, supra, and which will be discussed hereinafter, we are convinced that there was substantial evidence to support "The finding of two separate and distinct agreements".

There was here no "stretching and tailoring of the accessory after the fact statute in a manner which violates the due process guaranties of the Fifth amendment". The appellants were "accessories after the fact" *quoad* Thompson, in that they sought to "hinder or prevent" his *punishment* after his *conviction. Quoad Steinberg,* they were merely "concealing" him from *arrest.*

Section 3 *alone* refers to shielding from *punishment:* Section 1071 stops short of *that,* and concerns itself

merely with the offense of shielding a person from "discovery and arrest".

The appellants' objections to the application of Sections 3 and 371 are without validity.

8. *The Search and Seizure Were Lawful, and the District Court Did Not Err in Denying the Motions to Suppress.*

The testimony in connection with the motions for the return of seized property and its suppression as evidence has been fully summarized *ante*. It would be a work of supererogation to repeat that summary here.

Suffice it to say, Morrow, the real estate broker, testified that the appellant Kremen, alias "Mrs. Lee Kaplan", rented the cabin through him, giving out the now-familiar story of the apocryphal "brother" suffering from "nerves". Special Agent Whelan told how F.B.I. agents had been observing the cabin from six o'clock that morning to R-hour (raid hour) or 1:05 that afternoon. The agents observed all the appellants and their co-conspirator Thompson coming out of the cabin and re-entering it. About 30 or 45 minutes before the arrest, the officers knew "for sure" that the admitted "bail jumper" Thompson was one of the cozy Commie coterie, which turned out to be well-nurtured with New York steaks. Within an hour before the arrest, Agent Whelan "verified" Steinberg's presence in the premises.

The appellants apparently had spent the night at the cabin, since the F.B.I. men did not see any one

enter the house since the dawn's early light, when the occupants began to emerge.

It is hornbook law that officers have the right to arrest without a warrant when a felony is being committed in their presence. They *knew* that Thompson and Steinberg were fugitives from justice. They had reason to believe that all the appellants were harboring Thompson and that the appellants Kremen, Ross, and Coleman were harboring the appellant Steinberg.

It is likewise elementary that officers have a right, as an incident to a valid arrest, to search the place where the arrest is made.

We advert now to the *reasonableness* of the search.

For a proper understanding of this phase of the case, it is necessary to glance a moment at the prior record of the co-conspirator Thompson and the appellant Steinberg, in connection with violations of the Smith Act.

At the outset, it should be borne in mind that the appellants themselves concede that "Steinberg was indicted in 1951 for the same offense of which Thompson was convicted in 1949". Let us briefly examine the record of that indictment and that conviction.

Thompson was convicted in the United States District Court in New York, and his conviction was affirmed by the Second Court of Appeals on August 1, 1950. United States v. Dennis, 2 Cir., 183 F. 2d 201. The Supreme Court affirmed on June 4, 1951. Dennis v. United States, 341 U.S. 494. Thompson was ad-

mitted to bail pending the Supreme Court's review of decision of the Court of Appeals, and he absconded after an order on mandate had been entered by the District Court directing him and others who had been convicted with him, to surrender on July 2, 1951, to the United States Marshal in New York City. He never did surrender but, as we have seen, was arrested at Twain Harte. See Williamson v. United States, 2 Cir., 1950, 184 F. 2d 280, opinion by Mr. Justice Jackson, acting as Circuit Justice, who extended Thompson's bail pending certiorari; and United States v. Thompson, 2 Cir., 1954, 214 F. 2d 545, affirming United States v. Thompson, D.C. N.Y. 1953, 117 F.Supp.685, which was a judgment of criminal contempt against Thompson, handed down by the United States District Court for the Southern District of New York, based on Thompson's failure to respond to a surrender order. In that criminal contempt case, certiorari was denied, 1954, 348 U.S. 841.

In the words of appellants' counsel, Thompson was a "bail jumper", and at the time of his arrest in California "he was punishable not only as one who had been convicted of a crime but also as one who had failed to surrender in obedience to a court order".

Steinberg, under the name of Sidney Stein, had been indicted in the United States District Court for the Southern District of New York for conspiracy to violate the Smith Act, and on June 20, 1951, a bench warrant was issued for his arrest.

At the time of the arrests, Agent Whelan informed both Thompson and Steinberg "that they were be-

ing arrested because of the warrants that were outstanding for the arrest of both of them in the Southern District of New York."

Against this factual background relative to the court history of the appellant Steinberg and the coconspirator Thompson, and their sojourn at the cabin in the company of the appellants Kremen, Coleman, and Ross, their comrades, the legal relationship of the quintet becomes reasonably clear.

This legal relationship will be developed more fully hereinafter, in considering the specified error relating to the alleged insufficiency of the evidence to support the verdicts. For the time being, we need only point out that the agents had observed the appellants actually "assisting" Thompson, apparently to "hinder and prevent" his "apprehension and punishment".

The F.B.I. officers had reasonable cause to believe that a felony was being committed in their presence. They did not need then to be in possession of all the facts.

The officers likewise had the right, incidental to a valid arrest, to search the place in which the arrest was made. Nor is the mere quantity of material taken objectionable, provided that the arrest was valid and the search made thereunder was reasonable. Mere quantity of material seized does not make the search unreasonable.

In Harris v. United States, 1947, 331 U.S. 145, 148-155, heavily relied upon by the appellants themselves,

two valid warrants of arrest were issued, one charging a violation of the Mail Fraud Statute and the other alleging a crime arising under the National Stolen Property Act. Five F.B.I. agents arrested the suspect and searched his apartment, consisting of a living room, bedroom, bathroom, and kitchen. The agents stated that the object of their search was to find two canceled checks that were thought to have been used in effecting a forgery involved in the charges *set worth in the warrants of arrest.*

The conviction appealed from, however, was on sixteen counts of an indictment charging violations of the *Selective Training and Service Act of 1940 and Sec. 48 of the Criminal Code as it then stood* (35 Stat. 1098, 18 U.S.C. Sec. 101 (1940 ed.)), relating to the receipt, etc., of property stolen from the United States.

As the search neared its end, one of the agents discovered an envelope containing eight "Notice of Classification" cards and eleven Registration Certificates. It was that evidence upon which the conviction *for violation of the Selective Training and Service Act was based, and it was conceded that the evidence was in no way related to the crimes for which the prisoner was initially arrested and that the search which led to its discovery was not conducted under the authority of a search warrant.*

In an opinion affirming the conviction, Mr. Chief Justice Vinson said:

> "This Court has also pointed out that it is only *unreasonable* searches and seizures which come un-

der the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.' (Case cited)

"The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.

"The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in Agnello v. United States, *supra,* (269 U.S. 20, 30) . . . it was said: 'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.' It is equally clear that a search incident to arrest which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subjected to search.

"Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. Petitioner was in exclusive possession of a four-room apartment. His control extended quite as much

to the bedroom in which the draft cards were found as to the living room in which he was arrested. The canceled checks and other instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment . . . . the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.

"Similar considerations are applicable in evaluating petitioner's contention that the search was, in any event, too intensive (as contended in the instant case). Here again we must look to the particular circumstances of the particular case, . . .

"Nor is this a case in which law-enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime. In the present case the agents were in possession of facts indicating petitioner's probable guilt of the crimes for which warrants of arrest were issued. . . .

"In keeping the draft cards in his custody petitioner was guilty of a serious and *continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband mate-*

rial. If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated.

". . . we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable." (Emphasis supplied)

In United States v. Rabinowitz, 1950, 339 U.S. 56, the defendant was convicted of selling and of possessing and concealing forged and altered obligations of the United States with intent to defraud. The question there presented involved the reasonableness of a search without a search warrant of a place of business consisting of a one-room office, the search being incidental to a valid arrest.

A printer who possessed plates for forging "overprints" on canceled stamps was taken into custody. He disclosed that the defendant, a dealer in stamps, and an old offender, was one of the customers to whom he had delivered stamps bearing forged overprints. A postal employee was sent to the defendant's place of business to buy stamps bearing overprints. He bought four stamps, which were sent to an expert to determine whether the overprints were genuine. A report was received that the overprints were forgeries, though the stamps themselves were genuine. The overprints had been placed upon the stamps after-

cancellation, and not before, as was the Government's practice. A warrant for the defendant's arrest was obtained.

Armed with this warrant, Government officers and two stamp experts went to the defendant's place of business, a one-room office open to the public. The defendant was arrested, and over his objection the officers searched the desk, safe and file cabinets for about an hour and a half. They seized 573 stamps, on which it was later determined that overprints had been forged.

The defendant was indicted on two counts, one charging the sale of four forged and altered stamps, and the second alleging that the defendant had possessed and concealed, with intent to defraud, the 573 forged and altered stamps.

The question there was whether the 573 stamps, the fruits of the search, were admissible in evidence. The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In restricting the ambit of the Fourth Amendment, the Supreme Court said:

> "It is unreasonable searches that are prohibited by the Fourth Amendment. (Case cited.) It was recognized by the framers of the Constitution that

there were reasonable searches for which no warrant was required. The right of the 'people to be secure in their persons' was certainly of as much concern to the framers of the Constitution as the property of the person. Yet no one questions the right, without a search warrant, to search the person after a valid arrest. * * *

". . . *Even if the warrant of arrest were not sufficient to authorize the arrest for possession of the stamps, the arrest therefor was valid because the officers had probable cause* (as in the instant case) *to believe that a felony was being committed in their very presence.* (Case cited.) * * *

"The right 'to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed' seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest. (Case cited.) *It became accepted that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not 'unreasonable'.*" (Cases cited.) Pages 60 and 61.

The Court then quoted at some length from Marron v. United States, 1927, 275 U.S. 192, 199, in which the following pertinent statement is found:

"The authority of officers to search and seize the things by which the nuisance was being maintained, *extended to all parts of the premises used*

for the unlawful purpose." (Emphasis supplied.) Page 62.

The appellants assert that "searches without search warrants are condemned unless they fall within two narrow classes"; namely, where the searches are "incident to a valid arrest" (as here) or in "special circumstances". Continuing, the appellants complain as follows:

> ". . . the arresting officers were confronted by no emergency . . . The preparations made for at least two days prior to the arrest demonstrate without question that the officers could easily have applied for warrants—and without in any way interfering with their handling of the case."

The appellants quote extensively from the case of Trupiano v. United States, 1948, 334 U.S. 699, 708, including the following sentences:

> "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be strictly limited right. *It grows out of the inherent necessity of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.*" (Emphasis supplied)

The appellants' reliance upon *Trupiano* is unfortunate; for that case has been specifically overruled by the Supreme Court itself on the very point that we are here discussing; namely, the "inherent necessity of the situation at the time of the arrest". In United States v. Rabinowitz, supra, 339 U.S. at pages 64-66, the Court said:

"Assuming that the officers had time to procure a search warrant, were they bound to do so? We think not, because the search was otherwise reasonable, as previously concluded. In a recent opinion, *Trupiano v. United States,* 334 U.S. 699, this Court first enunciated the requirement that search warrants must be procured when 'practicable' in a case of search incident to arrest.* * *

"A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

"It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not

> disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required." (Emphasis is the Supreme Court's)

Addressing its attention once more to *Trupiano*, the Supreme Court continued:

> "To the extent that *Trupiano v. United States*, 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case *is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.*" (Emphasis supplied)

Without laboring this point further, we hold that, both on reason and on authority, and "in the total atmosphere of the case," the search and seizure in the instant case did not violate the Constitution.

9. *The Evidence Was Sufficient to Support the Conviction of Each of the Appellants.*

In the first place, the appellants complain that, "while the indictment charges that Thompson had been convicted of conspiring to organize a society for

the overthrow of the government by force and violence, the proof was that Thompson had been convicted of conspiring to organize a society to 'teach and advocate' the forcible overthrow of the government".

The recital in the indictment that Thompson was convicted in the United States District Court in the City of New York did not state an issue in the present case. That Thompson was convicted is both undisputed and indisputable. The District Judge instructed the jury:

> "Now, with reference to that first count of the indictment, let me say to you that you need not examine the facts or the record presented to determine whether or not Robert Thompson committed the crime therein described, because I now tell you and instruct you as a matter of law that the record shows that Thompson was convicted of the said crime in a United States court, and that judgment was pronounced against him and has become final. Consequently, Thompson did commit the crime of conspiring to teach the overthrow and destruction of the United States Government by force and violence."

Actually, the technical charge of which Thompson was convicted was "conspiring to organize the Communist Party of the United States as a group 'to teach and advocate the overthrow and destruction' of the government 'by force and violence,' and 'knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying' the government by 'force and violence'." United States v. Dennis, 2

Cir., 1950, 183 F. 2d 201, 205, affirmed, 1951, 341 U.S. 494, 517.

An inartificiality in pleading, *by way of recital* in an indictment, of the conviction of an individual who is not even a defendant in the case at bar, cannot be tortured into being a basis for reversible error in failure of proof. Neither could incomplete language in a trial judge's instructions be thus magnified.

The full story of Thompson's conviction and "bail-jumping" is stated in the appellants' own opening brief. There is no merit to their technical objection that "The conviction of Thompson as charged here was not proved".

Finally, the appellants urge that "There was insufficient evidence of knowledge" of the identity of Thompson and Steinberg, and that "There was insufficient evidence of acts of assistance".

Here again, as in the case of the evidence relative to the search and seizure, we have already summarized the appellee's showing on the facts to so ample an extent that it would be superfluous to repeat that summary here. It might be helpful, however, to review briefly a few of the highlights:

(a) *Steinberg*

F.B.I. Agent McCann had known Steinberg since November, 1950. He testified that a wallet, pointed out by Steinberg as belonging to him, contained a fishing license, three business cards, etc., all containing the name "Newberg", but no material bearing the name "Steinberg". Special Agent Erickson had

previously testified that certain papers found in the cabin likewise bore the name "Newberg". John Lautner, the former high official in the Communist Party, had been acquainted with Steinberg, as well as with Ross and Coleman, for several years, and had occupied offices in the same Communist Party headquarters in New York in which Steinberg and Coleman had their offices. He saw Steinberg in the presence of Thompson at the 1948 National Convention of the Party.

Steinberg seemed to be the head of the household in the cabin.

(b) *Ross*

One of the papers taken from Ross was a mysterious note to one "Jim", containing the "hush-hush" references so frequently found in subversive epistolary literature. Two invoices covering Ross's purchases of a duplicating machine and supplies at an Oakland store showed that he used the name "R. E. Newman" and gave Redding as his address. Lautner saw Ross in the presence of Steinberg at the 1948 National Convention of the Communist Party. He also saw Ross in the presence of Thompson.

(c) *Coleman*

This Communist was present at the 1948 New York State convention of the Party, which Thompson attended. Coleman was in the presence of Thompson "numerous times" at the Communist Party headquarters. In connection with his duties in the Party, Lautner had occasion to work with Coleman, who,

like Lautner, was a member of "the New York State Organization Commission". On June 5, 1953, nearly three months before the Twain Harte raid, Coleman traded in an Olds automobile for a Hudson at St. Louis, signing the name "Gordon" to the necessary papers. During the July 4 holiday that same year, Coleman and Thompson were members of a party of four that rented two boats at a "fishing dock or boat resort" in Camdenton, Missouri.

(d) *Kremen*

Mrs. Shirley Kremen, alias Lee Kaplan, alias Lee Lefko Kaplan, proved herself to be the most accomplished fictionist of the lot. Her fabrications were worthy of Mark Twain and Bret Harte, the two writers after whom the picturesque Tuolumne hide-out was probably named. Although the record is silent as to this latter point, it is far from silent regarding Mrs. Kremen's fecund imagination. Special Agent Harter examined the contents of her purse at the time of the raid. He found therein two library cards, a fishing license, a campfire permit, a Social Security Card, a driver's license, a gas and electric bill, a water bill, and an invoice. These diverse documents possessed one trait in common: the name "Shirley Kremen" or any variations thereof were completely absent therefrom. On the contrary, the name favored by Mrs. Kremen at that time was "Kaplan".

The most brilliant flights of Mrs. Kremen's imagination, however, were reserved for Morrow, the unsuspecting Twain Harte real estate broker.

Her name, she said to Morrow, was "Mrs. Lee Kaplan". She wanted a cabin in a quiet spot for "a brother sick with nerves". Her brother was a musician. She liked the Germany place because "there was a stream there and it was very quiet".

Mrs. Kremen was not quite so successful in dealing with another Twain Harte business person. This happened to be a member of her own sex—Mrs. Dorothy Henrichsen, who, with her husband, owned a sports shop. In company with Steinberg and another man, identified as Thompson, Mrs. Kremen went to the sports shop to buy a pair of swim trunks "for a friend who was ill at the time". Mrs. Henrichsen tried to dissuade the trio from buying swim trunks for an absentee wearer-to-be, "because there is no return or refund on swimming clothes". Mrs. Henrichsen's sensible advice was not taken, and when Mrs. Kremen later tried to exchange the trunks, she was unsuccessful. Thereafter she dealt solely with *Mr.* Henrichsen.

The foregoing excerpts, isolated from their respective contexts, of necessity give only an incomplete picture of the subterfuges, deceptions, half-truths, and downright lies resorted to by the quartet in their effort to shield Thompson and Steinberg from capture.

Only a careful and critical perusal of the 941 pages of the transcript can give anything like an adequate picture of the situation.

Such perusal we have endeavored to make, and we find that the record supports the verdicts of the jury and the judgments of the court based thereon.

It will not do to give lip service to "that great Anglo-American institution, the trial jury", and then set aside a verdict whenever it happens to embody a conclusion with which some appellate judge happens to disagree.

10. *The Inartificial Recital of the Charge on Which Thompson Was Convicted Does Not Vitiate Counts 1 and 2.*

The appellants complain that "The first and second counts of the indictment do not state any offense against the United States since they do not charge Thompson with a violation of the Smith Act." We have already referred to the looseness in pleading Thompson's conviction, and have fully set forth the precise charge on which he was convicted. We have also given the substance of the present indictment.

Counts 1 and 2 of the indictment specifically refer to Thompson's violation of "Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act".

The appellants were fully apprised of the crime of which Thompson was convicted. Not only was the trial fully covered by the press and officially reported in the Federal Reporter, Second Series, as already stated, but the very sections of the Smith Act under which Thompson was prosecuted are enumerated in Counts 1 and 2 themselves. Entirely illusory is the appellants' expressed fear that "The omission of the statutory language . . . lays appellants open as a

practical and legal possibility to another prosecution for the same offense".

Count One recites that on October 14, 1949, Thompson was convicted in New York for violations of three named sections of the Smith Act. It alleges that the appellants, knowing of his conviction, assisted Thompson in order to hinder his "apprehension and punishment".

Count Two again refers to Thompson's violation of the three sections of the Smith Act, and avers that the appellants conspired with each other and divers other persons to assist Thompson so as to prevent his apprehension and punishment.

These two counts are sufficiently specific to enable the appellants to prepare their defense and to protect them after their conviction from substantial danger of a new prosecution for the same offense. Their attack upon these counts is entirely without merit.

11. *The District Court's Instructions Were Adequate.*

(a) The appellants grudgingly concede that the lower court's instruction on reasonable doubt was proper when they say:

> "Although the trial court paid lip service to the rule that in order to justify a conviction the circumstances had to be not only consistent with guilt but inconsistent with innocence . . ."

Translated into non-polemical language, this means that the instruction on reasonable doubt was correct. In any event, we so hold.

The appellants do object, however, to the District Judge's comment on the rule, as follows:

> "Now, that rule has been given by judges for a long time, I myself have considerable doubt about it, although I tell you that it is the law, because I think it is just a hifaluting way of saying what I have already said to you, namely, that you can't find a verdict of guilty unless you are convinced of guilt beyond a reasonable doubt; and of course if you can draw two reasonable hypotheses from the same circumstances, of course there must be a reasonable doubt. But nevertheless I give you this rule because for a long time it seems to have been in the books."

The insistence of the appellants seems to be upon the "hypothesis of guilt" versus the "hypothesis of innocence" rule; for they say that "it is quite possible to have no reasonable doubt about a hypothesis of guilt while the evidence yet may also justify a hypothesis of innocence".

Yet it is precisely this "hypothesis of guilt" versus "hypothesis of innocence" rule that the Supreme Court has roundly criticized in no uncertain terms. In Holland v. United States, 1954, 348 U.S. 121, 139-140, the Court said:

> "The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions (Cases cited), but the better rule is that where the jury is properly instructed (as here) on the standards

for reasonable doubt, *such an additional instruction on circumstantial evidence is confusing and incorrect,* (Authorities cited)." (Emphasis supplied)

The appellants also complain that "the court expressly told the jury that there was no difference between a case in which the evidence was direct and one in which it was only circumstantial, since in both cases all that was required was the absence of a reasonable doubt. But that is not the law, . . ."

In the *Holland* case, however, supra, 348 U.S. at page 140, the Supreme Court succinctly declared that the statement to which the appellants object *is* the law:

"Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. *If the jury is convinced beyond a reasonable doubt, we can require no more.*" (Emphasis supplied)

(b) The appellants also assert error in the trial court's instruction that, "as a matter of law the record shows that Thompson was convicted of the said crime (described in the first count of the indictment)". We have already fully discussed the matter in connection

with the sufficiency of the evidence. The instruction complained of discloses no reversible error.

12. *The Appellants Are Not in a Position to Complain of the Court's Failure to Give Certain Instructions: the Charge Given by the District Judge Was Adequate.*

The appellants assert that certain "full and complete instructions on the meaning and significance of the words used in the accessory and harboring statutes" were not given by the District Judge.

After the Court had delivered its charge to the jury, counsel for the appellants made the following statement relating to the above alleged omissions:

"Mr. Gladstein: The only other thing, your Honor, please, I don't have them listed, but we submitted, your Honor knows, a number of instructions dealing with such matters as harboring, concealing, accessory after the fact, matters of that kind, which I suppose your Honor feels that portion thereof with which your Honor agrees or which your Honor approves has been synthesized in your own instructions.

"But I do feel we requested matters of law to be given to the jury which are not comprehended within your Honor's instructions, and they are specifically set forth in our instruction. *I don't bear them in mind at the moment.* But I do want to take exceptions to your Honor's failure to give those instructions to the jury, particularly on the subject of what the purpose of harboring and concealing must be.

"In other words, by way of illustration, that not every form of assistance to a person who is a

fugitive constitutes a violation of the law, and matters of that kind, which were embraced within the instructions which were submitted." (Emphasis supplied)

Rule 18(2)(d) of this Court provides in part as follows:

"'* * * When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial."

Rule 30 of the Federal Rules of Criminal Procedure reads in part:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

A glance at the casual, vague, and generalizing remarks of counsel quoted above plainly reveals that neither Rule 30 of the Rules of Criminal Procedure nor our Rule 18 (2)(d) was observed by him. Indeed, after the appellee's brief called attention to Rule 30, the subject of omitted instructions was not thereafter mentioned in the appellants' reply brief.

In recent years, this Court has repeatedly announced its intention to enforce the above two rules, and has so fully spelled out its reasons for doing so that they will not be repeated here.[4]

---

[4]See Mitchell v United States, 9 Cir., 1954, 213 F. 2d 951, 957, certiorari denied, 1955, 348 U.S. 912.

Nevertheless, we have carefully examined the instructions of the learned and experienced District Judge and find that, contrary to the appellants' contentions, he *did* deliver "full and complete instructions on the meaning and significance of the words used in the accessory and harboring statutes".

There is no merit to this sixth and final point urged by the appellants in their brief.

13. *Conclusion*

Sections 2 and 101 of the Internal Security Act of 1950 (50 USCA Secs. 781 and 811) contain vitriolic philippics against Communism.[5] These sections are not pious generalizations such as might be found in a preamble or in a joint resolution. *They are formal statutory enactments by Congress;* enactments co-equal in authority with any other Federal legislation; enactments that all American judges, State or Federal, are sworn to uphold until such Congressional pronouncements are declared unconstitutional by the Supreme Court.

These statutory "indictments" of Communism are too lengthy to quote in full. We content ourselves with reproducing the first and ninth "counts":

> *"Sec. 781 Congressional finding of necessity*
>
> "As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

[5]It should be pointed out, however, that Sec. 4(f) of the same Act specifies that "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

"(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by *treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.*

* * * *

"(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement." (Emphasis supplied)

This Congressional pronouncement accords with our own views and deep feelings on the subject. We do not propose to chase Constitutional phantoms that will lead us to assist a group of subversives in escaping condign punishment. We must avoid *leaning* too far backward in being "fair" to Communists, lest we *fall* backward into an abyss of error and give these enemies of the United States "aid and comfort"!

The Constitution does not require the judges who apply it to dwell in an ivory tower, or to reason in a vacuum, or to throw common sense out of the window.

The evidence in the instant case makes it clear that all the appellants knew that Thompson had been con-

victed under the Smith Act, and that he was a fugitive. They also knew of Steinberg's indictment.

We believe that there was ample lawful evidence to support the judgments of guilty against the appellants Kremen, alias "Kaplan"; Steinberg, alias "Stein" alias "Newberg"; Coleman, alias "Gordon"; and Ross, alias "Newman".

The judgments are affirmed.

HEALY, Circuit Judge

I agree with the result reached in the affirming opinion.

The evidence of the guilt of the appellants on the counts of which they were convicted was necessarily circumstantial. The situation involved was very much out of the ordinary—so much so that there is little or no precedent for it. The accused persons were obviously individuals of intelligence, and it would strain credulity to the breaking point to infer from the circumstances anything other than that they knew perfectly well who each of their associates was and for what purpose all had gathered together in this remote cabin in the depths of the mountains. The jury were properly and fully instructed as to the law and the burden of proof resting on the government, and I see no ground upon which we would be justified in disturbing their verdict.

As to the search and seizure by the officers, I think it was warranted by law in the circumstances shown.

DENMAN, Chief Judge, dissenting:

The court's opinion violates the long established and essentially required practice of considering separately the different appeals of the four appellants, presenting in all eighteen contentions of error. The opinion's pages of high rhetoric of the obvious, denouncing those who would seek to overthrow the government by force, creates no excuse for such a violation. Rather it enforces our obligation to proceed in the non-Bolshevik method of such separate consideration of each of the several contentions of each defendant presented here. It is pertinent that the trial judge found no such condign wickedness in the demeanor of the defendants before him or in the reports of the probation officer. Of the 18 U.S.C. §3 cases he imposed less than the maximum sentences and by making some of the sentences concurrent, none received the maximum sentence.

I. THE CONVICTIONS OF KREMEN, ROSS AND COLEMAN OF VIOLATING 18 U.S.C. §1071.

A. What Must Be Proved.

To convict one of violating Section 1071 the Government must prove that he harbored or concealed, so as to prevent discovery or arrest, any person for whose arrest a warrant had been issued under any law of the United States. Moreover the defendant must be shown to have harbored or concealed for the purpose of preventing discovery or arrest "after notice or knowledge of the fact that a warrant or process had been issued for the apprehension of such person".

Thus the Government must prove four things: the issuance of a federal warrant, the act or acts of harboring or concealing, a purpose to prevent discovery or arrest, and the knowledge of the defendant of the existence of the federal warrant. Mere occupancy of a house with a fugitive is not sufficient, and "general malevolence is not enough if the specific knowledge required by the statute is lacking." Fullbright v. United States, 91 F.2d 210, 212 (Cir. 8, 1937).

There is no question that a federal warrant had been issued for the arrest of Steinberg on June 20, 1951 after his indictment on a charge of violating the Smith Act. [18 U.S.C. §2385] The issue here is whether, as to each defendant considered individually, the Government proved acts of harboring or concealing Steinberg in order to prevent his discovery or arrest and the knowledge of each that a federal warrant had been issued for his arrest.

B. What Was Proved As To Each Defendant Accused of Violating 18 U.S.C. §1071.

(i) *Shirley Kremen.* There was ample evidence introduced to show that this defendant harbored or concealed Steinberg in order to prevent his discovery or arrest. She procured the secluded cabin "for her sick brother," did the shopping and housework, and helped establish a false identity for herself and Steinberg. These are acts of harboring and concealing done at least to prevent Steinberg's discovery.

However, the Government failed to prove that she did these acts to prevent discovery with knowledge

that a federal warrant had been issued for Steinberg's arrest. The evidence showed only that she knew she was hiding him. It did not go further. There was no showing that she knew Steinberg's actual identity, his position in the Communist Party or even that he was a member of that Party. There is no evidence in the record that indicates that Mrs. Kremen was a Communist or even sympathetic to the aims and purposes of that Party.

There are many reasons why Mrs. Kremen might have hidden Steinberg. Among others, she might have known of the existence of the federal warrant. But equally as possible she might have thought that state police were seeking the man she knew as "Newberg", and she might have had a reason to protect him. She might have been a Communist or sympathetic to the Communist Party and told that Steinberg was to go "underground" in order to assume a new identity so that he could act in the future without being identified as a Communist.

The Government had the burden of negativing these alternative inferences. It, but not the majority opinion, recognizes this. The Government argues that an analogy to a stolen property situation should be applicable. One found with such property has the burden of explaining how he received it. The Government asks this court to place a similar burden on one found in the presence of a fugitive when such a person has done acts of concealing to prevent discovery. However, unlike personal property, Steinberg could transport himself from place to place and could give Mrs.

Kremen any number of reasons why she should hide him. There is no reason to infer that he told her of the warrant rather than some other reason. The Government's position would place upon defendants in this type of case the burden of proving their innocence.

Mrs. Kremen's conviction on this count should be reversed.

(ii) *Samuel Coleman.* The evidence indicates that Coleman arrived at the Twain Harte cabin only a week before the arrest on August 27, 1953 although Kremen, Steinberg and perhaps Ross had been there since June or July of that year. The evidence produced by the Government showed only that Coleman had lived at the cabin and knew who Steinberg was. There was no evidence of any acts of harboring or concealing. He was not shown to have even helped with the housework or shopping. His mere presence in Twain Harte for a week does not constitute harboring or concealing Steinberg to prevent his discovery or arrest. It is more likely that Steinberg was concealing Coleman as far as the evidence in the record is concerned. There is no evidence at all that Coleman knew that a warrant for Steinberg's arrest had been issued.

Coleman's conviction on this count should be reversed.

(iii) *Carl Ross.* To show Ross' acts of harboring or concealing Steinberg the United States introduced two documents found on his person at the time of his arrest. One was the "contact" letter mentioned in the majority opinion which indicated that Ross was

to secretly meet someone. The other was a grocery list calling for large quantities of food. The jury could have inferred that Ross was relaying messages to and from the people at the cabin and was providing Steinberg with food. These are acts of harboring or concealing to prevent discovery or arrest.

The evidence to show why Ross did these acts is as follows: Ross knew that Steinberg was a Communist Party member, that he had altered his appearance, and that he was living at a remote cabin. Ross was relaying messages to and from the cabin. Ross was a member of the Communist Party himself. The Government apparently urges that the jury could draw the following inferences. Communist Party members were interested in Smith Act indictments, especially of members who were leaders and whom they knew personally. Such indictments were publicized in the Communist Party press as well as in newspapers of general circulation. It was likely that Ross, being a Communist, would have read of the indictment of Steinberg, and that Ross would have realized that a warrant for arrest often follows an indictment. When he discovered Steinberg using an assumed name, having an altered appearance, and living in a remote cabin, he would have inferred that Steinberg was hiding from such a warrant.

However, there is no showing that Steinberg's indictment or warrant for arrest was ever publicized in the Communist Party press, or that, if they were so publicized, that Ross had read about it. Ross, like Mrs. Kremen, could have hidden Steinberg for any number of reasons.

The court in the Fulbright case, supra, concerning a prosecution under Section 1071, made the following observations which are relevant here:

> "Knowledge that the fugitives were evading officers in general or that a state government had issued warrants for their arrest is immaterial. Such acts are beyond the purview of the statute."
>
> * * *
>
> "Every circumstance pointed out is consistent with knowledge that Langan and Sparger [the criminals harbored in the Fulbright case] were criminals, but it is equally consistent with appellant's ignorance of outstanding [federal] warrants for their arrest."
>
> Fulbright v. United States, 91 F.2d 210, 213, 214 (Cir. 8, 1937).

II. CONSPIRACY OF KREMEN, ROSS AND COLEMAN TO VIOLATE 18 U.S.C. §1071.

Since the Government has failed to prove a case of harboring, as that crime is defined in Section 1071, against any of these three defendants it follows that the count charging a conspiracy to harbor Steinberg must fall as well for the same reasons.

III. THE CONVICTIONS OF KREMEN, ROSS, COLEMAN AND STEINBERG OF VIOLATING 18 U.S.C. §3.

A. What Must Be Proved.

All of the appellants were convicted of being accessories after the fact to Robert Thompson's Smith Act conviction. Section 3 of Title 18 provides:

> "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact."

Therefore to convict appellants the Government must prove that (1) they knew Thompson had committed an offense against the United States, (2) they received, relieved, comforted or assisted Thompson, and (3) they did so in order to hinder or prevent his punishment. Again the evidence as to each appellant must be considered separately.

B. What Was Proved As to Each Defendant Accused of Violating 18 U.S.C. §3.

(i) *Shirley Kremen.* Mrs. Kremen received, relieved, comforted and assisted Thompson by providing food and housing for him. However, there is no evidence to support an inference that she did so to prevent his punishment or that she had knowledge that Thompson had committed an offense against the United States. Thompson arrived at the cabin only a week before the arrest although Mrs. Kremen had been there some three months. There is no evidence she knew who Thompson was, that he was a Communist or that he was hiding from anyone. The evidence is just as consistent with the inference that she was hiding Steinberg and regarded Thompson as a trusted friend of Steinberg's who had come to visit or discuss business as it is with the inference of her knowledge as to who Thompson really was. No evi-

dence was admitted which would show that she had any reason to follow in the newspapers the first Smith Act trial where Thompson was convicted, the appeal or Thompson's "bail jumping".

The conviction as to this count should be reversed.

(ii) *Carl Ross.* Ross' grocery shopping activities and contacts with others to bring information to the cabin constituted acts of receiving, relieving, comforting and assisting Thompson. The question is whether he knew that Thompson had committed an offense against the United States and whether Ross' assistance was designed to prevent Thompson's punishment. Ross knew Thompson as a Communist leader before Thompson's Smith Act conviction. Ross disappeared from his Minneapolis, Minnesota home shortly after that conviction and established a false identity for himself. He aided Thompson after seeing him with dyed red hair, noticing a large weight increase and learning that Thompson was using the name of Brennan. The jury could reasonably infer that Ross was aware of Thompson's Smith Act conviction and acted to prevent his punishment.

There was sufficient evidence to support the judgment as to this count.

(iii) *Samuel Coleman.* Coleman procured a car for Thompson and traveled with him to isolated resorts in Missouri and Montana. He helped establish a false identity for Thompson as "Brennan." These are acts of receiving, relieving, comforting or assisting Thompson. The jury could reasonably infer that Coleman knew that Thompson had been convicted of

violating the Smith Act and assisted him in order to prevent his punishment. Coleman was an officer of the Communist Party and well acquainted with Thompson. He disappeared from his New York home, leaving his wife and children, shortly after Thompson's conviction. He knew Thompson was dyeing his hair red and using a false name. Coleman established a false identity of his own. The jury could infer that such an official would know of the Smith Act conviction of one of the top leaders of the Communist Party.

There was sufficient evidence to support the conviction as to this count.

(iv) *Sidney Steinberg.* Steinberg, who was apparently in charge of the group at the cabin, provided lodging for Thompson. This was an act of receiving, relieving, comforting or assisting him. The jury could reasonably infer that Steinberg knew that Thompson had been convicted of violating the Smith Act and had assisted him in order to prevent his punishment. Steinberg and Thompson were both high leaders of the New York Communist Party. Steinberg knew Thompson, having worked with him a number of years including the year Thompson's trial began.

There was sufficient evidence to support the conviction as to this count.

IV. CONSPIRACY OF KREMEN, ROSS, COLEMAN AND STEINBERG TO VIOLATE 18 U.S.C. §3.

Since the Government has failed to prove a case of assisting Thompson to prevent his punishment with

knowledge that he had committed a crime against the United States as to appellant Kremen, it follows that the count charging her with a conspiracy to so assist Thompson must fall as well for the same reasons. The counts charging Coleman, Ross and Steinberg with a conspiracy to so assist Thompson should be affirmed.

V. SEARCH AND SEIZURE.

Is the taking to San Francisco of all of the personal property of the four appellants from the four-room house and the two nearby automobiles, and the failure to make any search thereof until in San Francisco some two hundred miles from the house, a violation of the Fourth Amendment provision that appellants shall be "secure in their persons, houses, papers and effects against unreasonable searches and seizures?"

Certainly the seizure and transportation to San Francisco, the home of none of the appellants, of all their personal property other than that found to constitute evidence was beyond the authority of the federal officers. No question was asked of appellants whether they desired a caretaker to watch the house to see that such other property as the television set, etc., was not stolen. While this wrong done is not cognizable in this case it makes clear that the intent was to search their "papers and effects" in San Francisco and not in the place of arrest which may have been authorized by Harris v. United States, 331 U.S. 145 and other cases.

In my opinion such a search of the "papers and effects" in San Francisco violates the Fourth Amendment. The situation is analogous to that in United States v. Lefkowitz, 285 U.S. 452, recognized as still the law in United States v. Rabinowitz, 339 U.S. 56 at page 62.

(Endorsed:) Opinion. Concurring and Dissenting Opinion. Filed Jan. 20, 1956. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 14,359

Shirley Kremen, Carl Ross, Samuel Irving Coleman, and Sidney Steinberg,
Appellants,
vs.
United States of America,
Appellee.

JUDGMENT

Appeals from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this cause be, and each of them hereby is affirmed.

(Endorsed) Judgment
Filed and Entered: January 20, 1956
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, April 20, 1956

Before: Denman, Chief Judge; Healy and Lemmon, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, Denman, Chief Judge dissenting, It Is Ordered that the petition of Appellants, filed March 21, 1956, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of the above cause be, and hereby is denied.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascer-

tained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTES INVOLVED

18 U.S.C. 3, upon which the first count of the indictment was based, reads:

"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

"Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years."

18 U.S.C. 371, upon which the second and fourth counts of the indictment are based, reads:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. 1071, upon which the third count of the indictment is based, reads:

"Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such persons, shall be fined not more than $1,000 or imprisoned not more than six months, or both."

Reply Brief for Petitioners

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONERS.

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Subject Index

		Page
I.	The invalidity of the arrests and the search	1
II.	The unconstitutional application of the relevant statutes	6
III.	The defect in the indictment and its variance from the proof	8

Table of Authorities Cited

Cases	Pages
Bell v. United States, 349 U.S. 81	6
Berger v. United States, 295 U.S. 78	8
Brinegar v. United States, 338 U.S. 160	2, 3
Carroll v. United States, 267 U.S. 132	2
Cole v. Arkansas, 333 U.S. 196	8
Colson v. Johnston, 35 F. Supp. 317 (D.C. Cal.)	7
Contes v. United States, 215 F. 2d 324 (D.C. Cir.)	4
Dennis v. United States, 341 U.S. 494	8
Dimenza v. Johnson, 130 F. 2d 465 (9 Cir.)	70
Fulbright v. United States, 91 F. 2d 210 (8 Cir.)	2
Gebardi v. United States, 287 U.S. 112	7
Go-Bart Importing Co. v. United States, 292 U.S. 344	4
Gouled v. United States, 255 U.S. 298	4
Honig v. United States, 208 F. 2d 916 (8 Cir.)	4
Johnson v. United States, 333 U.S. 10	2
Lockhart v. United States, 136 F. 2d 122 (6 Cid.)	7
Marron v. United States, 275 U.S. 192	3
McDonald v. United States, 335 U.S. 451	5
People v. Allington, 103 C.A. 2d 911, 229 P. 2d 495	7
Pinkerton v. United States, 328 U.S. 640	7
Rea v. United States, 350 U.S. 214	4
Rent v. United States, 209 F. 2d 983 (5 Cir.)	4
Robinson v. United States, 143 F. 2d 276 (10 Cir.)	7
Short v. United States, 91 F. 2d 614 (4 Cir.)	6
Smith v. United States, 211 F. 2d 957 (6 Cir.)	7
State v. Hoffman, 78 Ariz. 319, 279 P. 2d 898	7
United States v. Arrington, 215 F. 2d 630 (7 Cir.)	4
United States v. DiRe, 332 U.S. 581	2

Page

United States v. Katz, 271 U.S. 354 7
United States v. Lefkowitz, 285 U.S. 452 4
United States v. Stein, 140 F. Supp. 761 (S.D.N.Y.) 8
United States v. Universal C.I.T. Corp., 344 U.S. 218 6

Codes

18 U.S.C.:
Section 751, et seq. 7
Sections 1071 and 1072 7
Section 3107 5

Constitutions

United States Constitution:
Fourth Amendment 6
Fifth Amendment 8

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONERS.

I.

THE INVALIDITY OF THE ARRESTS AND THE SEARCH.

The Government argues (Opp. 9-10)[1] that the arrests were valid because, once the fugitives had been

[1]The Government's assertion that evidence was taken from the "person" of petitioner Coleman is not supported by the record. When this petitioner was arrested he was wearing only a pair of swimming trunks (R. 194) and no evidence was taken from his person. Every bit of the evidence used against him was obtained as a result of the search of the cabin (R. 297), carried out without a warrant, and it was never shown that he had any connection or association with the articles so seized (R. 299).

identified, there was reasonable cause to believe that the felony of accessoryship after the fact was being committed in the presence of the agents. But this argument totally overlooks the fact that the crime referred to requires, as an essential element, something more than merely being in the presence of a fugitive (*Fulbright v. United States,* 91 F. 2d 210 [8 Cir.]), and that unless there is some reasonable basis for the belief that this additional element is present, the arrest is unlawful. *United States v. Di Re,* 332 U.S. 581; *Johnson v. United States,* 333 U.S. 10. While we do not dispute the proposition that the standard of proof required to show probable cause is less stringent than that required to establish guilt, we do insist that there must be some evidence leading the officers reasonably to believe that *every* essential element of the crime exists. Otherwise, in a case such as this, any casual visitor (the realtor, for example) who happened to be at the cabin at the moment of the arrest, could have been legally arrested.[2]

The Government's reliance on *Brinegar v. United States,* 338 U.S. 160, and *Carroll v. United States,* 267 U.S. 132, is misplaced. Those cases, regarded by this Court as very close to the borderline and decided over vigorous dissents, did not present any claimed infringement of constitutional rights by reason of "searching the house or other place of privacy"; they dealt only with a claimed "freedom to use public

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[2]To say that such a person would have been released when subsequent investigation showed him not to be a "communist" is to demonstrate the initial illegality of the arrest.

highways in swiftly moving vehicles for dealing in contraband, and to be unmolested by investigation and search in such movements". *Brinegar v. United States, supra,* at 176, 177. They should not be extended to cover the totally dissimilar activities complained of here.

Nor does *Marron v. United States,* 275 U.S. 192 (Opp. 11), justify the search. There, the arrest upon which the search was grounded was clearly valid for at least the following reasons: (1) The officers had gained access to the premises by virtue of a search warrant issued by a United States Commissioner (275 U.S. at 193); and (2) after entry, the officers actually observed the law being violated, i.e., intoxicating liquor being furnished to patrons (*ibid.,* at 194). Neither of these two factors is present here.

In addition, in *Marron* the officers seized only "things used to carry out the criminal enterprise" (*ibid.,* at 199). The record here shows that the officers did not so, or otherwise, limit themselves. On the contrary, after the arrests the officers searched all of the rooms and closets of the entire house; they read and examined papers and documents from boxes, suitcases, brief cases, and desk drawers located in different rooms throughout the house; they thoroughly searched two automobiles located in the parking area outside the house (R. 210-12, 288, 312). Later, in the absence of petitioners, the officers seized and removed "whatever was there" (R. 103), "everything . . . except that which the realtor . . . identified . . . as belonging to him" (R. 286). This mass of material was

then loaded into the officers' automobiles and driven to San Francisco for a more detailed search and analysis (R. 215, 289).

It required *25 closely typewritten pages* to prepare an inventory of the items so seized and removed to San Francisco (Exhibit A). These included: a great variety of papers, clothing, money, kitchen utensils, fishing gear, toilet articles, personal effects, furniture, and indeed almost everything imaginable. No cited case has ever presented a record showing a search and seizure of this unprecedented magnitude. Such a search and seizure was expressly condemned by this Court in *United States v. Lefkowitz,* 285 U.S. 452, which is not even cited in the Government's opposition.

Indeed, the Government's opposition not only fails to consider *Lefkowitz,* but in no way meets the thrust of the decisions in *Go-Bart Importing Co. v. United States,* 292 U.S. 344; *Gouled v. United States,* 255 U.S. 298, and *Rea v. United States,* 350 U.S. 214; it does not even consider the conflict between the decision below and decisions in other circuits: *Rent v. United States,* 209 F. 2d 983 (5 Cir.); *United States v. Arrington,* 215 F. 2d 630 (7 Cir.); *Honig v. United States,* 208 F. 2d 916 (8 Cir.); and *Contes v. United States,* 215 F. 2d 324 (D.C. Cir.).

Finally, the Government seeks to cover up the unconstitutional conduct of the officers by urging (Opp. 10) that there was no time to procure a search warrant. The Government completely ignores the record, citations to which are set out at pages 13 and 14 of

the petition, which shows without question that for at least three days prior to the arrests the trap was being closed on petitioners. In *McDonald v. United States,* 335 U.S. 451, the Government rejected an argument similar to that now tendered by the Government, saying:

> "We cannot allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily . . . No reason, except inconvenience of the officers and delay in preparing papers, and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for bypassing the constitutional requirement . . ." (335 U.S. at 455.)

To the extent that the time factor involved in *McDonald* appears to be greater than the minimum of three days which the record here reveals, it should be noted that efforts of petitioners to ascertain how much earlier preparations for the arrests began were frustrated by Government objections and adverse rulings of the trial court (R. 92-93, 276, 352-53, 440-41, 534).

Certainly during the period preparatory to the arrests, whatever was its duration, responsible officers of the Federal Bureau of Investigation could hardly have been unaware of the provisions of 18 U.S.C. 3107, which empowered them to make seizures "under warrant" for violations of federal law. Those officers must have realized that had they applied for a warrant, they would have had to comply with Rule 41, F. R. Crim. P. They also must have realized that such a procedure would have made impossible the

wholesale seizure of the evidence which was here used as the basis for the Government's case against petitioners. Whether the Government could have made a case against petitioners had they followed the requirements of the Fourth Amendment, the applicable statute and rule, and the decisions of this Court, is beside the point. The point is, that by disregarding their clear legal obligations, the officers have so tainted the case against petitioners that the convictions cannot stand.

II.

THE UNCONSTITUTIONAL APPLICATION OF THE RELEVANT STATUTES.

(a) The Government (Opp. 12-13) ignores the fact that there was an absolute identity of proof with respect to (a) the two substantive offenses; (b) the substantive offenses and the conspiracies; and (c) the two conspiracies. It fails to mention, much less meet, the fact already adverted to (Pet. 25-26) that all of the evidence was admitted against all of the defendants on all counts without any limitation or distinction. Thus the statutes were applied to petitioners here in a manner which resulted in a four-fold conviction for what at best was a single offense.

In addition, as already pointed out, the proof which of necessity was required to establish the harboring of one fugitive equally established the harboring of the other (cf. *United States v. Universal C.I.T. Corp.*, 344 U.S. 218; *Bell v. United States*, 349 U.S. 81; *Short v. United States*, 91 F. 2d 614 [4 Cir.]), and the

proof which established the harboring was, in view of the fact that there was more than one petitioner, also all that was required to make out the alleged agreement (cf. *United States v. Katz*, 271 U.S. 354; *Gebardi v. United States*, 287 U.S. 112; *Pinkerton v. United States*, 328 U.S. 640). Since the substantive offense "involves the same combination or community of purpose . . .", and since on this record it is shown to have been "impossible . . . to commit the substantive offense without cooperative action" (*Gebardi v. United States, supra*, at 121-22), the imposition of consecutive sentences against petitioners on the multiplicity of counts cannot stand.[3]

(b) The argument (Opp. 13) that adherence to the common law rule respecting accessoryship (Pet. 29-30), will frustrate the statutory purpose, is unsound for the reason that the Congress has itself distinguished between aid rendered before and aid rendered after conviction. Compare 18 U.S.C. 1071 and 1072, and 18 U.S.C. 751, *et seq.*

(c) Finally, the Government argues (Opp. 14) that the "suspicious circumstances" justify the convictions despite the absence of proof of *scienter* on the part of petitioners. But as the chief judge pointed out below, the analogy to the tax or stolen

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[3]The trend of the criminal law in the federal courts is against the multiplication of punishments for a single offense: *Dimenza v. Johnson*, 130 F.2d 465 (9 Cir.); *Lockhart v. United States*, 136 F.2d 122 (6 Cir.); *Robinson v. United States*, 143 F.2d 276 (10 Cir.); *Smith v. United States*, 211 F.2d 957 (6 Cir.); *Colson v. Johnston*, 35 F.Supp. 317 (D.C. Cal.); cf. *State v. Hoffman*, 78 Ariz. 319, 279 P.2d 898; *People v. Allington*, 103 C.A.2d 911, 229 P.2d 495.

property cases is inapposite, where as here the "object" of the crime is an articulate human being who may well have, and most probably did, conceal his true identity and status from petitioners (231 F. 2d at 180; R. 987-88; App. 65-66).

III.

THE DEFECT IN THE INDICTMENT AND ITS VARIANCE FROM THE PROOF.

We have fully explored this point in our petition (pp. 33-37) and we believe little comment is required in reply. The Government, like the majority below, does not deny the existence of the defect in the indictment or the variance between the charge and the proof. It chooses to call these matters "technical" (Opp. 16) and to refer to the indictment as a "compressed paraphrase" of Justice Vinson's opinion in *Dennis v. United States*, 341 U.S. 494.

But the demands of the Fifth Amendment that criminal pleading be certain and precise and that proof conform to charges are not to be met by such an argument. Constitutional rights cannot be minimized by the use of artful adjectives.[4] The infirmities here are at least as great as those which this Court struck down in *Berger v. United States*, 295 U.S. 78, and *Cole v. Arkansas*, 333 U.S. 196.

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[4]Significantly, when petitioner Steinberg sought to plead his conviction here as *res judicata* in a Smith Act prosecution in New York, his plea was there rejected. *United States v. Stein*, 140 F. Supp. 761, 767 (S.D.N.Y.).

The Government's opposition does not meet the real issues raised by the petition: (a) the unlawful search and seizures; (b) the unconstitutional application of the accessoryship and conspiracy statutes to petitioners here; and (c) the constitutional deficiencies in the indictment and proof. To resolve the issues so raised, for Communists and non-Communists alike, this Court should grant the writ, review the record, and reverse these convictions.

Dated, San Francisco, California,
September 10, 1956.

Respectfully submitted,
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No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

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Subject Index

	Page
Citation to opinions below	1
Jurisdiction	2
Constitutional provisions and statutes involved	2
Questions presented	5
Statement	12
Specification of errors	20
Summary of argument	20
Argument	26
I. The arrests of petitioners Kremen and Coleman without warrant violated their constitutional rights; the searches of all petitioners and of the premises, and the seizure of the books, papers and effects, all without warrant, and the subsequent introduction of this evidence against all petitioners, violated the constitutional rights of all petitioners.	26
(A) The arrest of petitioners Kremen and Coleman without warrant violated their constitutional rights	26
1. The principles against which the lawfulness of the arrests must be tested	29
a. The Fourth Amendment	29
b. The rules and the statute	30
2. Tested by the foregoing principles, the arrests were invalid	32
(B) The searches of all petitioners, and the premises and the seizure of their books, papers and effects, all without warrant, violated their constitutional rights	37
1. The facts of the search	37
2. The constitutional principles applicable to the searches	41

Page

3. Tested by the foregoing principles, the searches were invalid 42

a. The searches do not fall within the narrow scope of the "incident to arrest" exemption 43

b. There were no exceptional circumstances which justified the search without warrant 52

II. Sections 3, 371 and 1071 of Title 18 of the United States Code were unconstitutionally applied to petitioners in that (A) petitioners were placed in double jeopardy by an unconstitutional pyramiding of offenses; (B) Section 3 was construed in a manner contrary to the common law and to the requirements of the Fifth and Sixth Amendments; and (C) the sections were applied to petitioners in the absence of any evidence of scienter 58

(A) Petitioners were placed in double jeopardy by an unconstitutional pyramiding of offenses 58

1. The conviction of petitioners Kremen and Coleman on both the accessoryship and harboring counts is invalid or, in the alternative, the conviction of petitioners Kremen and Steinberg on the accessoryship counts must be reversed for lack of evidence to support it 60

2. The conviction of petitioners Kremen and Coleman for participating in two conspiracies is invalid 62

3. The conviction of all petitioners on the conspiracy counts, in addition to their convictions on the substantive counts is invalid 63

(B) Section 3 was construed and applied in a manner contrary to the common law and to the requirements of the Fifth and Sixth Amendments 66

(C) The statutes were improperly applied to petitioners in the absence of any proof of scienter 73

Page

1. The harboring counts 73

2. The accessoryship counts 76

III. The conviction of petitioners on Counts 1 and 2 of the indictment cannot be sustained because (A) these counts did not allege facts sufficient to constitute an offense against the United States; (B) There was a fatal variance between the pleading of Thompson's conviction and the proof thereof; and (C) the charge with respect to Thompson's conviction was erroneous 79

(A) Counts 1 and 2 did not allege facts sufficient to constitute an offense against the United States 79

(B) There was a fatal variance between the pleading of Thompson's conviction and the proof thereof 82

(C) The charge with respect to Thompson's conviction was erroneous 83

onclusion 86

Table of Authorities Cited

Cases	Pages
Agnello v. United States, 269 U.S. 20	22, 42, 43, 44, 46, 49, 50
Albrecht v. United States, 273 U.S. 1	29
Baxter v. United States, 188 F. 2d 119 (6 Cir.)	22, 44, 45
Bell v. United States, 349 U.S. 81	62
Bollenbach v. United States, 326 U.S. 607	84
Boyd v. United States, 116 U.S. 616	41, 43
Braverman v. United States, 317 U.S. 49	23, 63
Brinegar v. United States, 338 U.S. 160	21, 23, 35, 54
Bushouse v. United States, 67 F. 2d 843 (6 Cir.)	47
Byars v. United States, 273 U.S. 28	28
Carroll v. United States, 267 U.S. 132	21, 23, 35, 52, 53, 54
Cole v. Arkansas, 333 U.S. 196	25, 83
Commonwealth v. Miller, 2 Ashm. 61	69
Coplon v. United States, 185 F.2d 629 (2 Cir.), cert. den. 342 U.S. 920	21, 23, 31
Cruikshank v. United States, 92 U.S. 542	25
Davis v. United States, 328 U.S. 582	42, 44
DeJonge v. Oregon, 299 U.S. 353	25, 83
Dennis v. United States, 341 U.S. 494	5, 8, 13, 81, 82
Dent v. State, 43 Tex. Cr. 123, 65 S.W. 2d 627	71
Dimenza v. Johnson, 130 F. 2d 465 (9 Cir.)	65
Entick v. Carrington, 19 How. St. Tr. 1029	41
Ex parte Collett, 337 U.S. 55	71
Frohwerk v. United States, 249 U.S. 204	63
Fulbright v. United States, 91 F.2d 210 (8 Cir.)	11, 21, 24, 34, 73, 76
Gebardi v. United States, 287 U.S. 112	23, 65
Go-Bart Importing Co. v. United States, 282 U.S. 344	10, 22, 42, 48, 51
Gouled v. United States, 255 U.S. 298	10, 41, 43
Grau v. United States, 257 U.S. 124	42
Guilbeau v. United States, 287 F. 731 (5 Cir.)	83

Pages

Hammer v. United States, 271 U.S. 620 82
Harrison v. United States, 7 F. 2d 259 (2 Cir.) 59
Henderson v. United States, 12 F. 2d 528 (4 Cir.) 47
Holland v. United States, 348 U.S. 121 ..... 75, 78, 81

Jeffers v. United States, 342 U.S. 48 55
Johnson v. United States, 333 U.S. 10 .....
..... 2, 23, 31, 33, 42, 52, 54, 55, 56, 57

Krulewitch v. United States, 336 U.S. 440 59

Lanzetta v. New Jersey, 306 U.S. 451 70

Maggio v. Zietz, 333 U.S. 56 ..... 24, 75
Marron v. United States, 275 U.S. 192 ..... 49, 50, 51
McDonald v. United States, 335 U.S. 451 .....
..... 10, 21, 22, 23, 37, 42, 44, 56
McGrain v. Daugherty, 273 U.S. 135 ..... 21, 29
McKnight v. United States, 183 F. 2d 977 (D.C. Cir.) 47
Mesarosh v. United States, 352 U.S. 87

Neal v. United States, 102 F. 2d 643 (8 Cir.) 76, 83
Nye & Nissen v. United States, 336 U. S. 619 67

O'Neill v. United States, 236 F. 2d 636 (6 Cir.) 65

Papini v. United States, 84 F. 2d 160 (9 Cir.) 44, 46, 47
People v. Brite, 9 C. 2d 666 32
People v. Craig, 152 C. 42 32
People v. Yee, 145 A.C.A. 607 (Calif.) 32
Perreira v. United States, 341 U.S. 1 ..... 23, 60
Pettway v. United States, 216 F. 2d 106 (6 Cir.) 82
Pierce v. United States, 314 U.S. 306 69
Pinkerton v. United States, 328 U.S. 640 65

Quinn v. United States, 349 U.S. 155 42

Rex v. Burridge, 3 P. Wms. 439 69
Rex v. Greenacre, 8 Car. & P. 35 69
Robinson v. United States, 143 F. 2d 276 (10 Cir.) 65
Rose v. United States, 149 F. 2d 755 (9 Cir.) 82

Pages

Schneiderman v. United States, 320 U.S. 118 77
Short v. United States, 91 F. 2d 614 (4 Cir.) 62
Silverthorne Lumber Co. v. United States, 251 U.S. 385 .....42, 43
Skelly v. United States, 76 F. 2d 483 (10 Cir.) cert. den.
295 U.S. 767 .....11, 24, 66, 67, 71, 77
Slochower v. Board of Higher Education, 350 U.S. 511 77
Smith v. United States, 211 F. 2d 957 (6 Cir.) 65
Stack v. Boyle, 342 U.S. 1 77
Steeber v. United States, 198 F. 2d 615 (10 Cir.) 22, 46

Takahashi v. United States, 143 F. 2d 118 (9 Cir.) 47
Taylor v. United States, 286 U.S. 1 47
Tot v. United States, 319 U.S. 463 .....74, 75

United States v. Adams, 281 U.S. 202 63
United States v. Ausmeier, 152 F. 2d 349 (2 Cir.) 34
United States v. Chapman, 3 F. Supp. 903 (S.D. Ala.) 66
United States v. Cohen, 197 F. 2d 26 (3 Cir.) 63
United States v. Coplon, 185 F. 2d 629 (2 Cir.) 39, 56
United States v. Cruikshank, 92 U.S. 542 79
United States v. Di Re, 322 U.S. 581 .....21, 28, 29, 35, 53, 54
United States v. Falcone, 109 F. 2d 579 59
United States v. Green, 140 F. Supp. 117 (S.D.N.Y.) 13
United States v. Hutcheson, 312 U.S. 219 82
United States v. Jeffers, 342 U.S. 48 .....10, 22, 23, 42, 44, 46, 56
United States v. Katz, 271 U.S. 354 65
United States v. Kirschenblatt, 16 F. 2d 202 (2 Cir.) 49
United States v. Lee, 83 F. 2d 195 (2 Cir.) 46
United States v. Lefkowitz, 285 U.S. 452 ....10, 22, 42, 48, 51, 57
United States v. Lindenfeld, 142 F. 2d 829 (2 Cir.) ..49, 50, 51, 52
United States v. National City Lines, 337 U.S. 78 71
United States v. Paglia, 190 F. 2d 445 (2 Cir.) 67
United States v. Peoni, 100 F. 2d 401 (2 Cir.) 67
United States v. Perlstein, 126 F. 2d 789 (3 Cir.) 34
United States v. Pincourt, 159 F. 2d 917 (3 Cir.) 34
United States v. Rabb, 141 F. 2d 46 .....21, 29
United States v. Rabinowitz, 238 U.S. 78 .....44, 49, 50, 63
United States v. Stein, 140 F.Supp. 761 (S.D.N.Y.) 81
United States v. Thomas, 113 F. 2d 643 (7 Cir.) 21
United States v. Thompson, 113 F. 2d 643 (7 Cir.) 37

Pages

United States v. Thompson, 214 F. 2d 545 (2 Cir.) 5
United States v. Trachtenberg, et al., S.D.N.Y., No. C-136-7 58
United States v. Univer[illegible] C.I.T. Credit Corp., 344 U.S. 218 ..... 23, 62
United States v. Weitzel, 246 U.S. 533 70

Weeks v. United States, 232 U.S. 383 ..... 42, 43, 47
Wieman v. Updegraf, 344 U.S. 183 ..... 25, 71
Williams v. United States, 179 F. 2d 644 (5 Cir.) 70
Williamson v. United States, 184 F. 2d 280 (2 Cir.) 37
Worthington v. United States, 166 F. 2d 557 (6 Cir.) ... 29, 31, 44
Wrightson v. United States, 222 F.2d 556 (D.C. Cir.) .. 21, 29, 30

Constitutions

United States Constitution:
First Amendment 83
Fourth Amendment 2, 6, 11, 20, 29, 46, 47, 54, 57
Fifth Amendment 2, 3, 11, 12, 20, 46, 47, 54, 57, 59
Sixth Amendment 2, 3, 11, 20

Miscellaneous

93 Cong. R. 5181-82 71
94 Cong. R. 7928, 8906 71

H. R. Rep. 304, 80th Cong., 1st Sess. 71
H. R. 1600, 80th Cong., 1st Sess. 71
H. R. 2055, 80th Cong., 1st Sess. 71
H. R. Rep. 1928, 83d Cong., 2nd Sess. 58

Sen. Rep. 1620, 80th Cong., 2nd Sess. 71
Sen. Rep. 2141, 83rd Cong., 2nd Sess. 58

Rules

Federal Rules of Criminal Procedure:
Rule 3 30
Rule 4 ..... 21, 30
Rule 41 ..... 22, 52

Statutes

Pages

Title II, Section 26 (National Prohibition Act, 41 Stat. 315, 27 U.S.C.A. 40) 52

Smith Act, Sections 2, 3 and 5 ..... 6, 79, 80, 82

Texas Penal Code, Art. 86 71

Title 18, U.S.C., Chapter 1 (General Provisions) 72

18 U.S.C. 3 ..... 2, 3, 6, 11, 12, 20, 24, 66, 69, 76
18 U.S.C. 371 ..... 2, 4, 11, 20
18 U.S.C.A. 751 ..... 24, 72
18 U.S.C. 1071 ..... 2, 4, 7, 11, 12, 20, 24, 58, 59, 72, 73
18 U.S.C.A. 2236 45
18 U.S.C.A. 2384 83
18 U.S.C. 2385 ..... 12, 79, 83
18 U.S.C.A. 3052 ..... 21, 29, 31, 35
18 U.S.C.A. 3053 29
18 U.S.C.A. 3107 ..... 23, 53

28 U.S.C.A. 631 56
28 U.S.C.A. 1254(1) 2

Texts

47 Am. Jur., Searches and Seizures, 58 42

47 Am. Jur. 507, n. 6 42

Bishop, Criminal Law (9th Ed.):
Section 692 70
Section 697, pages 500-501 69

9 Halsbury's Laws of England (2d ed.), Sections 593-599 .. 68

2 Hawkins P. C. Section 29 68

"The History and Development of the Fourth Amendment to the United States Constitution", Lasson, Series LV No. 2 (Johns Hopkins University Studies in Historical and Political Science, 1937), pages 35, 95, 117 and 132..... 29

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

CITATION TO OPINIONS BELOW.

A written order of the District Court, denying a motion for the return of property allegedly illegally seized, was not reported, but appears at pages 26-28 of the Record and is printed at pages 1 to 3 of the Appendix to the Petition for Writ of Certiorari.[1] Opinions relating to the fixing of bail are reported at 114 F. Supp. 899, 207 F. 2d 772, and 100 L. Ed. 704. The three opinions of the Court of Appeals which ac-

[1]Cited herein as "App."

companied the affirmance of the judgments of conviction are reported at 231 F. 2d 155, 178 and 178.[2] They appear at pages 943, 984 and 985 of the Record and are printed at pages 4, 62 and 63 of the Appendix to the Petition for Certiorari herein, as are the judgment of the Court of Appeals and its order denying the petition for rehearing. (App. 74, 75; and See R. 992, 993.)[3]

JURISDICTION.

The judgment of the Court of Appeals was entered on January 20, 1956 (231 F. 2d 155; R. 992; App. 74). A timely petition for rehearing was denied on April 20, 1956 (231 F. 2d 155; R. 993; App. 75). On May 7, 1956, Mr. Justice Douglas extended, until June 18, 1956, the time within which petitioners might file a petition for certiorari (R. 993). The petition was dated June 11, 1956 and was filed on June 14, 1956. It was granted on October 8, 1956 (R. 994).

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourth, Fifth and Sixth Amendments to the Constitution, and Sections 3, 371 and 1071 of Title 18,

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[2]Circuit Judge Lemmon wrote an "affirming opinion"; Circuit Judge Healy wrote a concurring opinion; Chief Judge Denman wrote a dissenting opinion.

[3]Chief Judge Denman dissented from the order denying the petition for rehearing. No opinions accompanied that order.

United States Code, which are involved in this case, read, in pertinent part, as follows:

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand July, . . . nor shall [any person] be compelled in any criminal case to be a witness against himself, nor shall any person be deprived of life, liberty, or property, without due process of law . . ."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

18 U.S.C. 3, upon which the first count of the indictment was based:

"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

"Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maxi-

mum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years."

18 U.S.C. 371, upon which the second and fourth counts of the indictment were based:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. 1071, upon which the third count of the indictment was based:

"Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such persons, shall be fined not more than $1,000 or imprisoned not more than six months, or both."

QUESTIONS PRESENTED.

Petitioners were arrested, without warrants[4], in August of 1953 in a "raid" (R. 395, 529) conducted by agents of the Federal Bureau of Investigation at a dwelling house in Twain Harte, California. Present at the time, in addition to petitioners, was Robert Thompson, one of the defendants in *Dennis v. United States*, 341 U. S. 494, who had failed to surrender after this Court's decision in that case (see *United States v. Thompson*, 214 F. 2d 545 [2 Cir.]). After the arrests, the agents, in absence of petitioners (R. 102-105), without search warrants, seized all of the papers, books, personal effects and movable property located on the premises (R. 286), and transported all of this material, together with two automobiles and their contents, some 200 miles to San Francisco where it was studied and analyzed at the officers' leisure (R. 215, 289).

The sheer physical quantity of the materials so seized is indicated by the fact that 25 closely typewritten pages were required merely to prepare an inventory of the items taken by the arresting officers (Ex. A; R. 109[5]). Those items included, *inter alia*, a great variety of papers, clothing, money, kitchen utensils, fishing gear, toilet articles, personal effects, furniture, two automobiles—indeed, almost everything imaginable.

A week after the arrests, an agent returned to the premises, in the absence of petitioners and, without warrant, he searched a garbage can in an outhouse and

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[4]This does not apply to petitioner Steinberg. As to him see n. 27, *infra*.

[5]Attached hereto as Appendix A.

seized some ten empty beer cans (R. 384-385), on some of which were found fingerprints of petitioners (R. 446-451).

After petitioners were brought to San Francisco they were taken before a commissioner and complaints were sworn to (R. 103, 289).[6] Ultimately a four count indictment (R. 3-8) was returned by the Grand Jury, charging all three petitioners and others[7] with:

1. Violating 18 U.S.C. 3 by receiving, relieving, comforting and assisting Thompson in order to prevent his apprehension and arrest, knowing that Thompson had been convicted of "wilfully and knowingly conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence; the aforesaid being in violation of Sections 2, 3 and 5 of the Act of June 20, 1940, commonly known as the Smith Act" (R. 3).

2. Conspiring to commit the aforesaid offense with knowledge that Thompson had violated Sections 2, 3 and 5 of the Smith Act (R. 4). The only overt act alleged which had reference to Thompson was that peti-

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[6]And *after* the arrests had been consummated, a warrant was obtained to permit a search of Blau's (see note 7, *infra*) apartment (R. 741, 761).

[7]One person (Patricia Blau), later arrested at a different place, was jointly charged with petitioners, but as to her a judgment of acquittal was entered at the close of the prosecution's case (R. 75, 912). Another person (Carl Ross), who was found guilty with petitioners, was unable to raise the bail required by the court below and, having completed his sentence, is not a party to the present proceeding.

tioners occupied a cabin with Thompson on the day of the arrest, August 27, 1953.

Petitioners Kremen and Coleman were further charged with:

3. Violating 18 U.S.C. 1071 by harboring and concealing petitioner Steinberg, "with notice and knowledge . . . that a warrant had been issued for [his] apprehension" (R. 6).

4. Conspiring to commit the aforesaid offense with knowledge that a warrant had been issued for Steinberg's arrest (R. 7). The only overt act involving these petitioners which had reference to Steinberg was that they occupied the cabin with him on the day of the arrest (R. 8).

A pre-trial motion to dismiss the indictment because (1) it failed to state facts sufficient to constitute an offense; (2) it was vague and indefinite; and (3) the statutes upon which it was based were unconstitutionally applied to petitioners here, was made (R. 9-14) and overruled (R. 72). Also overruled were motions for discovery and inspection (R. 14), for a bill of particulars (R. 15), and for a pre-trial subpoena (R. 17).

Motions (R. 18-26) for the return of property seized in the raid and for its suppression as evidence were denied (R. 26-28). However, the prosecution was ordered to (R. 28), and did, furnish the 25 page inventory of the seized property already referred to (Ex. A; R. 109). The motions to return the property and to suppress it as evidence were later renewed and, after testimony was taken on the motions (R. 89-138, 164-180), they were

again denied (R. 73). Throughout the trial, by appropriate objections to the introduction of evidence and otherwise, petitioners continued to press this point (R. 204, 216, 217, 228, 231).

The evidence adduced upon the trial showed (1) that Thompson had been convicted in *Dennis* of conspiring to organize the Communist Party "to teach and advocate" the forcible overthrow of government;[8] (2) that Thompson had not surrendered after *Dennis* (there was no showing that Thompson was ever ordered or directed to surrender or that petitioners ever knew of such an order or direction, if one existed); (3) that a bench warrant had been issued in 1951 for Steinberg (there was no showing that petitioners [including Steinberg] ever knew of the existence of that warrant); (4) that petitioners were with Thompson in the Twain Harte house on the morning of the arrests; (5) that agents of the Federal Bureau of Investigation seized from the persons of petitioners[9] and Thompson, and from the house, papers and documents bearing fictitious names; (6) that the appearances of Steinberg and Thompson were different in 1953 from what they had been in earlier years; (7) that for some time preceding the raid Coleman had been in Thompson's company at places in

[8]Ex. 121; R. 901. The quoted words are omitted from the indictment here (*supra*, p. 6).

[9]Not, however, from the person of petitioner Coleman. As to him, the record shows that at the time of his arrest he was wearing only a pair of swimming trunks (R. 194) and that no evidence was taken from his person. Every bit of the evidence used against him was obtained as a result of the search of the cabin (R. 297), carried out without a warrant. It was never shown that he had any connection or association with any of the articles so seized (R. 299).

Missouri and Montana; (8) that Coleman had associated with Thompson and possibly Steinberg in New York City ten years earlier in the Communist Party.

Except for the fact that they were all at the house at the time of the arrest, this last item was the *only* connection between Coleman, Thompson and Steinberg. In other words, they were together at Twain Harte and they were Communists. This is the only evidence tying these petitioners to each other and to Thompson. This is the only evidence of a "conspiracy."[10]

Petitioners' motions for judgments of acquittal, made at the conclusion of the Government's case, were denied (R. 75). The jury returned a verdict of guilty against petitioners on all counts.[11] A new motion for judgments of acquittal, as well as motions in arrest of judgment and for a new trial, subsequently made, were all denied (R. 76).

Judgments of imprisonment were pronounced as follows:

Petitioner Kremen: one year on Count 1 and one year on Count 2, to run concurrently, six months on Count

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[10]This, however, does not even apply to petitioner Kremen. Concerning her there is no showing whatsoever of Communist membership or association, or any connection with any of the others, save and except in Twain Harte during the summer of 1953. The prosecution was seriously concerned about this deficiency in its evidence and, to remedy it, sought, unsuccessfully, to show that while a student in Los Angeles in 1949, she had a "strong familiarity" with the "left wing attitude" (R. 847). The trial judge quite correctly did not permit proof to be offered along these lines.

[11]The jury was out approximately nine hours (R. 929, 939). Just twenty minutes before it returned its verdict, it reported its inability to agree on some counts (R. 937). After further instructions (R. 938-939), it convicted on all counts.

3 and six months on Count 4, to run concurrently with each other and with the sentences imposed on Counts 1 and 2: total imprisonment, one year.

Petitioner Coleman: one year on Count 1, one year on Count 2, six months on Count 3 and six months on Count 4, *all to run consecutively:* total imprisonment, three years.

Petitioner Steinberg: two years on Count 1, one year on Count 2, *both to run consecutively:* total imprisonment, three years.

Notices of appeal (R. 76-80) were timely filed.

The Court of Appeals, Chief Judge Denman dissenting, expressing its "own views and deep feeling on the subject [of Communism]" said it would not "chase Constitutional phantoms that will lead us to assist a group of subversives in escaping condign punishment" (231 F. 2d 178; R. 984; App. 61).[12] It held therefore that (1) despite the absence of arrest and search warrants, and in the face of this Court's opinions in *Gouled v. United States,* 225 U. S. 298; *United States v. Lefkowitz,* 285 U. S. 452; *Go-Bart Importing Co. v. United States,* 292 U. S. 344; *Johnson v. United States,* 333 U.S. 10; *McDonald v. United States,* 335 U.S. 451; and *United States v. Jeffers,* 342 U.S. 48;[13] petitioners' con-

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[12]Although there was no evidence to justify such a characterization, Judge Lemmon referred to petitioners as "these enemies of the United States" (231 F. 2d at 178; R. 984; App. 61). Judge Healy's brief concurrence was more moderately and judiciously worded (231 F. 2d 178; R. 985; App. 62).

[13]None of which were mentioned in the affirming opinions, although they were cited to the court below in the briefs, and although the *Lefkowitz* case was cited in the dissenting opinion.

stitutional rights were not invaded by the arrests, searches and seizures; (2) despite the decisions in *Skelly v. United States,* 76 F. 2d 483 (10 Cir.) cert. den. 295 U. S. 767, and *Fulbright v. United States,* 91 F. 2d 210 (8 Cir.)[14] the statutes involved were constitutionally applied to petitioners; and (3) despite the variance between the indictment and the proof, and the "incomplete" charge on this point, the convictions could stand.

The petition for certiorari presented, and the case now presents, the following questions:

1. (a) Whether the arrests of petitioners Kremen and Coleman without warrant violated rights guaranteed to them by the Fourth, Fifth and Sixth Amendments to the Constitution; and (b) whether the searches of all three petitioners, the search of the house and the outhouse, and the seizure of all the books, papers and the other personal property therein—all without warrant—and the subsequent introduction into evidence against all petitioners of all the material so obtained, violated rights guaranteed to each of them by the Fourth, Fifth and Sixth Amendments to the Constitution.

2. Whether Sections 3, 371 and 1071 of Title 18 United States Code, or any of them, were unconstitutionally applied to all petitioners.

3. (a) Whether the indictment stated a crime against the United States; (b) whether the proof varied

[14]These opinions were not mentioned in the affirming opinions although they were cited to the court below in the briefs, and although *Fulbright* is referred to in the Chief Judge's dissenting opinion.

from the indictment, contrary to the requirements of the Fifth Amendment to the Constitution; and (c) whether the trial court, with the approval of the Court of Appeals, correctly instructed the jury on this subject.

STATEMENT.

The following is taken from that portion of the "Statement" in the government's brief filed in opposition to the petition for the writ, (pp. 2-8) insofar as it applies to these petitioners:

On October 22, 1953, a four count indictment was returned against petitioners. The first count charged petitioners with being accessories after the fact in violation of 18 U.S.C. 3, by receiving, relieving, comforting and assisting Robert G. Thompson, a convicted Smith Act (now 18 U.S.C. 2385) fugitive, knowing him to be such;[15] the second count charged all the petitioners with conspiracy to violate 18 U.S.C. 3. The third count charged the petitioners, except Steinberg, with violating 18 U.S.C. 1071, by harboring and concealing Steinberg, knowing that a warrant had been issued for his apprehension; the fourth count charged the petitioners (except Steinberg) with conspiracy to violate 18 U.S.C. 1071 (R. 3-8).

During the period charged in the indictment, both Thompson and Steinberg were fugitives from justice.

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[15] This is not quite correct. The indictment did not charge petitioners knew Thompson to be "a convicted Smith Act . . . fugitive". It charged only, and improperly as we shall show below, pp. 79-82, that petitioners knew that Thompson had been "convicted" of a violation of law. It did *not* charge that they knew he was a fugitive.

Thompson was a defendant in *Dennis*, a case receiving widespread news coverage, in which eleven leaders of the Communist Party were indicted, tried, and found guilty of conspiring to violate the Smith Act (R. 893). The judgment of conviction was affirmed by the Court of Appeals for the Second Circuit (183 F. 2d 201) and then affirmed by this Court in *Dennis v. United States*, 341 U. S. 494. Pending the appeal, Thompson had been admitted to bail. After his conviction had been affirmed, Thompson fled rather than surrender to serve his sentence, thereby forfeiting his $20,000 bail.[15a]

Petitioner Steinberg, together with 20 others, was indicted on June 19, 1951, by a grand jury in the Southern District of New York and charged with conspiracy to violate the Smith Act (R. 893). Sixteen of the persons charged in this indictment were apprehended shortly thereafter. Petitioner and three others charged could not be apprehended at that time.

Despite intensive efforts by the Federal Bureau of Investigation, both Thompson and Steinberg remained at large until their apprehension by agents of the Federal Bureau of Investigation on August 27, 1953, at a secluded cabin in the Sierra Nevada mountains near the small village of Twain Harte, California,[16] in the com-

[15a]The four *Dennis* defendants who failed to surrender after conviction are apparently the only ones who so behaved, despite the fact that scores of persons have since been prosecuted under the Smith Act. In February of this year the remaining fugitives voluntarily surrendered to serve their sentences. Cf. *United States v. Green*, 140 F. Supp. 117 (S.D.N.Y).

[16]A glance at any standard map of California will show that Twain Harte is on State Highway 108, one of the principal east-west highways crossing the Sierra Nevada, from the great California Cen-

pany of petitioners Kremen and Coleman (R. 201, 340, 421-422).

Thompson and petitioners Steinberg and Coleman were all long-time intimates. Thompson, Coleman and Steinberg had their offices in the same building, Communist Party headquarters in New York, at approximately the same time (R. 509-512, 516). Coleman and Steinberg were identified as being with or in the presence of Thompson on numerous occasions, including conventions and meetings (R. 519-523, 855-856, 857). At approximately the same time that Thompson and petitioner Steinberg became fugitives from justice, petitioner Coleman left his family and home (R. 609-615).

Petitioner Kremen, under the assumed name of Mrs. Lee Kaplan (R. 619, 621), rented the cabin near Twain Harte.[17] She specified she wanted "a spot where it would be quiet and rather secluded" (R. 620) for her "brother" (R. 620) who was "sick with nerves" (R. 620). In renting this particular cabin, she stated that she liked it because it was "very quiet" (R. 621).

Petitioner Steinberg identified himself as "Mr. Newberg", and petitioner Kremen as his "sister", to the owner of the cabin (R. 669-670). Steinberg seemed to be the host or household head at the cabin, extending

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tral Valley to Nevada. The town, in a heavily populated summer resort area, is but ten miles from Sonora, the county seat of Tuolumne County, and about 70 miles from the metropolitan city of Stockton, California.

[17]This, and most of what follows, became apparent to the agents only after the arrests. There was no evidence to suggest that it was known to them *prior* to the arrests.

an invitation to have breakfast to the owner, Mr. Germany (R. 669), and ordering Mrs. Kremen to pay Germany for a light bill (R. 671).

In the period preceding the arrest, petitioner Kremen made several purchases of large quantities of food (R. 682-683, 778-781). On one occasion, she and a man attempted to purchase hair dye (R. 683).[18] Mrs. Kremen also performed various household tasks for the occupants of the cabin and hired a repairman to fix the cabin pump (R. 194, 669, 695). In the company of Thompson and Steinberg, Mrs. Kremen purchased a pair of swim trunks "for a friend that was ill at the time" (R. 700-702).

It appeared at the trial that petitioner Coleman was with Thompson for some time prior to their apprehension. On June 5, 1953, Coleman purchased a Hudson automobile in St. Louis, Missouri, using the assumed identity of "William Gordon" (R. 548, 549).[19] The keys to this automobile were found in Thompson's pocket when he was apprehended (R. 430, 555, 558). Coleman (under the name of "Gordon") and Thompson were members of a party of four which rented boats at a resort in Camdenton, Missouri, on July 4, 1953 (R. 565, 576). In Bigfork, Montana, Thompson purchased a fishing license under the false name of "J. F. Brennan" (R. 596-597). Using their false names,

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[18]When apprehended, Thompson had dyed red hair and a moustache dyed red (R. 326). [Note: This and the following footnotes in this "Statement" are substantially from the government's brief in opposition, save when otherwise indicated.]

[19]Coleman stated he wanted the car "as soon as possible" and paid for it in cash (R. 549).

Thompson and Coleman stayed at a cabin some 30 miles from Bigfork from August 10 to August 17, 1953 (R. 601). They used a Hudson automobile with Missouri license plates on this trip (R. 602). The Hudson automobile purchased by "Gordon" in Missouri entered California on August 20, 1953 (R. 409-410, 412). Also, Coleman and Thompson were seen together in Twain Harte prior to their arrest (R. 701, 709).

Thirty minutes after positive identification of Thompson and petitioner Steinberg had been made on August 27, 1953, at Twain Harte (R. 197, 323-324), agents of the Federal Bureau of Investigation arrested Thompson and petitioners. At the time of the arrest, Thompson and Steinberg were in the clear area in front of the cabin, while petitioners Kremen and Coleman were inside the house (R. 201). It was apparent that Thompson and the petitioners had spent the night at the cabin and were well established there (R. 189, 192-195, 210-212; G. Exs. 14-18, A-1 through A-14)[20]. Both Thompson and petitioner Steinberg had altered their physical appearance considerably, so that they looked much different than they had when they became fugitives. Thompson had dyed his hair, gained much weight and had grown a mustache since he left New York (R. 325-326). Steinberg had cropped his hair short, had grown a mustache, and was much thinner both in face and body (R. 325). When apprehended, none of the occupants of the cabin had any visible means of sup-

[20]These exhibits were all seized *after* the arrest. Thus, what was "apparent" to the officers became so only after, not before, the search here assailed as unlawful. [This is our footnote, not the

port.[21] However, Thompson's wallet contained approximately $363 (R. 432) and approximately $450 was found in a belt on a chair in the cabin (R. 376-377).

The FBI agents made a search of the cabin and of the persons of the individuals apprehended at the time of the arrest.[22] Thompson and petitioner Steinberg had elaborate documentary proof of false identities and were using aliases. Thompson had no less than twelve documents identifying him as "John F. Brennan" (R. 432-434; G. Ex. 97). Steinberg admitted ownership of a wallet containing false identification in the name of "Joshua Newberg", supposedly a teacher of violin and mandolin (R. 331, 334-336). Other identification for "Joshua Newberg" was found in the cabin (R. 232; G. Exs. 23, 24, 25).

Petitioner Kremen's purse contained a library card, a fire permit, a Social Security card, an identification card, and an automobile operator's license, all in the name of "Lee Kaplan"; she also had some bills and an invoice containing the name of "Richard Kaplan" (R. 362-363; G. Ex. 86). False identification documents for "William Gordon", the name assumed by petitioner Coleman (R. 548, 549, 575-576), were found in a wallet discovered in the cabin (R. 899).

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[21]The relevancy of this observation escapes us. Most persons found in vacation resorts do not appear to have visible means of support. In any case, the government has not suggested that the arrests were justified because of the "apparent" commission of the misdemeanor of vagrancy. [This is our footnote, not the government's.]

[22]However, see n. 9, *supra*. And actually, the search of the cabin occurred substantially *after* the arrests (R. 215, 286, 289, 384-385). [This is our footnote, not the government's.]

After various pre-trial motions (R. 18, 21, 22) for suppression and return of property found at the cabin at the time of arrest had been disposed of,[23] the trial commenced. Following the impaneling of the jury, petitioners apparently made another motion to suppress (R. 163, 183) which was denied on April 13 (R. 73). During the trial, petitioners made motions to suppress on the grounds that the search was "illegal and improper" (R. 202, 204, 216, 217, 219, 220, 228, 231, and various other times throughout the trial). These were all denied.

The foregoing summary of the evidence taken from the government's brief in opposition, neglects to mention a factor of prime significance with relation to the questions presented because of the absence of arrest or search warrants, i.e., that preparations for the arrests began *at least* 72 hours prior to the raid. Thus, the record shows (1) that agents were dispatched from New York City in time to be in San Francisco on August 25, 1953, and to participate in the raid two days later (R. 352, 438); (2) that two days before the raid, agents left San Francisco for the Twain Harte area, carrying photographs and fingerprints of Thompson and Steinberg (R. 537); (3) that the next day additional agents left San Francisco to participate in the raid, but without any photographs or fingerprints of

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[23]Petitioners' motion of February 8, 1954, was denied on the ground that petitioners did not allege any interest in the property found on the premises searched (R. 26-28); petitioners' motion of April 5, 1954 was taken off the calendar by stipulation (R. 73).

petitioners Kremen or Coleman (R. 273-274); (4) that at least 24 hours before the raid, agents had petitioners and Thompson under surveillance (R. 525) but observed only "normal activities" (R. 117-120, 195); (5) that a constant vigil was maintained for the last 8 hours before the arrests (R. 133, 271); (6) that during all this time an elaborate two-way communication system had been set up (R. 197); (7) that surveillance through the use of a private electric company truck had been arranged (R. 533-534); and (8) that a matron had been dispatched to the scene (R. 275-276).

Obviously preparations for the raid were carefully made in advance and everything was done to assure its success. But at no time during this period, which was at least 72 hours long, did any agent of the Government apply to a United States Commissioner or Judge for arrest or search warrants. They did everything, but this one simple act of obeisance to the Constitution of the United States.

The government's statement also omits to mention the fact that about a week after the arrests (five days, to be exact) an FBI agent returned to the scene and, in the absence of petitioners and without their consent, conducted a search without warrant, of an outhouse and procured from a garbage can located therein evidence (fingerprints on beer cans) which was used against petitioners.

SPECIFICATION OF ERRORS.

The court below erred in holding:

1. That the arrests of petitioners Kremen and Coleman without warrant, and their subsequent prosecution, did not violate rights guaranteed to them by the Fourth, Fifth and Sixth Amendments to the Constitution; and that searches of all petitioners and the house and outhouse, and the seizure of all the books, papers and other personal property therein—all without warrant—and the subsequent introduction into evidence against all petitioners of the material so obtained, did not violate rights guaranteed to all of them by the Fourth, Fifth and Sixth Amendments to the Constitution.

2. That Sections 3, 371 and 1071 of Title 18 of the United States Code, or any of them, were constitutionally applied to petitioners here.

3. That the indictment stated a crime against the United States; and that the variance between the indictment and the proof, as well as the "incomplete" instruction on this point, did not require a reversal of the conviction of petitioners in the face of the requirements of the Fifth Amendment to the Constitution.

SUMMARY OF ARGUMENT.

I

(A) The arrests of petitioners Kremen and Coleman without warrant violated rights guaranteed to them by the Fourth Amendment, which protects against unreasonable arrests as much as it does against unreasonable

searches and seizures. *United States v. Rabb,* 141 F.2d 45 (3 Cir.); *Wrightson v. United States,* 222 F.2d 556 (D.C. Cir.) Cf. *McGrain v. Daugherty,* 273 U.S. 135, 156; *United States v. Di Re,* 322 U.S. 581, 595.[24]

There was ample time before the arrests to procure the necessary warrants. F.R.Crim. Pro., Rule 4. There was no such "likelihood" of escape as is required in the case of the citizen's arrest authorized by 18 U.S.C.A. 3052. Cf. *Coplon v. United States,* 185 F.2d 629 (2 Cir.), cert. den. 342 U.S. 920. In any case, there was no such emergency as was presented in *Carroll v. United States,* 267 U. S. 132, or *Brinegar v. United States,* 338 U.S. 160, to justify a disregard of the Constitution, the statute or the rule regulating the procedure to be followed in the procurement of arrest warrants (*Wrightson v. United States,* 222 F.2d 556 [D.C. Cir.]).

The record does not support the claim that the arrests were justified on the theory that these petitioners were committing a felony in the presence of the officers. All of the evidence shows that they were doing nothing whatsoever to excite any suspicion. The mere fact that they were in the presence of fugitives does not justify the arrests. *Fulbright v. United States,* 91 F.2d 210 (8 Cir.).

(B) The search and seizure violated the constitutional rights of all petitioners. In the absence of a warrant, searches are condemned unless they fall within

[24]By the generalized introduction of the evidence thus obtained, their rights, as well as the rights of the petitioner Steinberg under the Fifth Amendment, were also violated. *McDonald v. United States,* 335 U. S. 452; *United States v. Thomas,* 113 F. 2d 643 (7 Cir.).

one of two narrowly circumscribed exceptions: (a) if they are incidental to a valid arrest, or (b) if the facts present "special circumstances" warranting a by-passing of the constitutional requirement. *United States v. Jeffers,* 342 U.S. 48. The record here reveals that the government has not discharged its heavy burden (*McDonald v. United States,* 335 U.S. 451) of establishing that this case is embraced within either of these exceptions.

The only possibly valid arrests were those of Thompson and Steinberg *outside the premises.*[25] These arrests did not justify the subsequent search of the *interior* of the house, of the persons of Kremen or Coleman, of the automobiles or the outhouse, because those searches were not "incidental" to those arrests in terms of time, place or purpose. *Agnello v. United States,* 269 U.S. 20; *Baxter v. United States,* 188 F.2d 119 (6 Cir.); *Steeber v. United States,* 198 F.2d 615 (10 Cir.). None of the arrests—even including those of Coleman and Kremen—justified, or could conceivably justify, the search of the outhouse five days later. Especially does the purpose of the searches—rummaging, exploratory attempts to procure evidence—condemn them as violative of petitioners' constitutional rights. *Go-Bart Importing Co. v. United States,* 282 U.S. 344; *United States v. Lefkowitz,* 285 U.S. 452.

There was no emergency which justified the by-passing of the constitutional requirement to obtain a search

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[25]As to the arrests of Coleman and Kremen, see *supra* I(A).

warrant. *Johnson v. United States,* 337 U.S. 10; *McDonald v. United States,* 335 U.S. 451. This was not a case of persons illegally carrying concealed contraband in swiftly moving vehicles or on public highways, like *Carroll v. United States,* 267 U.S. 132, or *Brinegar v. United States,* 338 U.S. 160. Nor is there here any legislative authority which might have given a stamp of reasonableness to the officers' conduct, as there was in the *Carroll* case. Here there was merely the naked assertion of authority to search without warrant in the face of 18 U.S.C.A. 3107, which empowers agents of the FBI to make seizures "under warrant", and of F. R. Crim. Pro., Rule 41, which prescribes how a warrant may be obtained. Neither of these was followed. There was no evidence of imminent flight, which could have justified the action of the officers, and in any case, there were available constitutional methods to cope with the situation. *United States v. Jeffers,* 342 U.S. 48; *Coplon v. United States,* 185 F.2d 629 (2 Cir.), cert. den. 342 U.S. 920.

II

(A) The multiple charges upon which petitioners were convicted (harboring, accessoryship and conspiracy) represented a pyramiding of the offenses against them for what was at most a single criminal offense. The separate crimes charged did not require the proof of facts not essential to each other. *Perreira v. United States,* 341 U.S. 1; *Gebardi v. United States,* 287 U.S. 112; cf. *Braverman v. United States,* 317 U.S. 49; *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218. Therefore petitioners were placed in double jeop-

ardy by the multiplicity of their convictions and the consecutiveness[26] of their sentences.

(B) At common law, and under the federal statutes which adopt the common law rule (*Skelly v. United States,* 76 F.2d 483 [10 Cir.] cert. den. 295 U.S. 757; Reviser's Note to 18 U.S.C.A. 3), post-conviction aid did not constitute the crime of accessoryship after the fact. Here that was the only type of aid rendered and while petitioners might conceivably have committed other crimes, they did not violate, and could not have violated, 18 U.S.C.A. 3—the accessoryship statute. The common law rule was preserved in the 1948 codification (cf. 18 U.S.C.A. 751, *et seq.,* and 1071, *et seq.,* with 18 U.S.C.A. 3), and remain the law today. While Congress might have changed that law, it did not do so. Petitioners were therefore improperly convicted under the first and second counts of the indictment.

(C) There was not the necessary proof that petitioners knew of the existence of federal process outstanding for the fugitives and intended to thwart it (cf. *Fulbright v. United States,* 91 F.2d 210 [8 Cir.]), and their convictions were therefore not justified. The "suspicious circumstances" surrounding their arrests are no legal substitute for such proof. Nor may adverse inferences be raised against them because of their failure to rebut the suspicions engendered by their mere presence at the same place as the fugitives. *Tot v. United States,* 319 U.S. 463; cf. *Maggio v. Zietz,* 333 U.S. 56. The past associations of some petitioners with

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[26]Or in petitioner Kremen's case, the excessiveness.

Thompson in the Communist Party do not justify any inference of their guilt. Cf. *Wieman v. Updegraf*, 344 U.S. 183.

III

(A) Counts 1 and 2 (the accessoryship count and its conspiracy counterpart) did not allege facts sufficient to constitute an offense against the United States. By charging that Thompson had been convicted of conspiring to "overthrow" Government and alleging that that offense was in violation of cited sections of the Smith Act which does not cover such an offense, the indictment was fatally defective by reason of inconsistency. At least it was so confusing and self-contradictory as to render it invalid. Such an indictment does not meet the constitutional tests of advising petitioners with certainty of the crime charged or of permitting them to plead this conviction as a bar in the future. *Cruikshank v. United States*, 92 U. S. 542.

(B) There was a fatal variance between the allegation that Thompson had been convicted of conspiring to overthrow government and the proof which showed that the conspiracy of which he had been convicted was one to "teach and advocate" certain noxious doctrines. While this proof might have supported a conviction against petitioners for accessoryship after the fact (apart from the question of its inadequacy in other respects, *supra* II [C]) to the offense of conspiring to teach and advocate, that was not the offense charged. Conviction, therefore, upon an offense not charged, violated petitioners' constitutional rights. *DeJonge v. Oregon*, 299 U. S. 353; *Cole v. Arkansas*, 333 U. S. 196.

(C) The charge to the jury that "as a matter of law" the proof showed Thompson to have been convicted of the crime charged was erroneous as clearly contrary to the record. At the very least, it was so equivocal in its failure to state what "the said crime" was or which was "the crime therein described" as to require a reversal of the judgment of conviction. *Bollenbach v. United States*, 326 U. S. 607.

ARGUMENT.

I.

THE ARRESTS OF PETITIONERS KREMEN AND COLEMAN WITHOUT WARRANT VIOLATED THEIR CONSTITUTIONAL RIGHTS; THE SEARCHES OF ALL PETITIONERS AND OF THE PREMISES, AND THE SEIZURE OF THE BOOKS, PAPERS AND EFFECTS, ALL WITHOUT WARRANT, AND THE SUBSEQUENT INTRODUCTION OF THIS EVIDENCE AGAINST ALL PETITIONERS, VIOLATED THE CONSTITUTIONAL RIGHTS OF ALL PETITIONERS.

(A) THE ARRESTS OF PETITIONERS KREMEN AND COLEMAN WITHOUT WARRANT VIOLATED THEIR CONSTITUTIONAL RIGHTS.

Whatever may be the situation as to petitioner Steinberg,[27] it is clear that there was no justification for the arrests of petitioners Kremen and Coleman. The government, conceding that no warrants were ever issued for the arrests of these petitioners (R. 100), seeks to

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[27]The record shows that while a bench warrant had been issued for Steinberg's arrest by the District Court for the Southern District of New York in July of 1951 (Ex. 122; R. 901), the arresting officers did not have it in their possession at the time of the arrest (R. 348-9, 439-40).

justify those arrests on the ground that there was probable cause to believe that a felony—being accessory after the fact—was being committed by these petitioners in the very presence of the arresting officers (Br. in Opp. 10).

But the record utterly fails to support such a contention. For the twenty-four hours that petitioners were under surveillance,[28] the officers never observed either of these petitioners (or indeed anyone else) commit an act which could reasonably be said to arouse even a suspicion that a crime had been or was being committed. According to the testimony of the agents, all that was observed during this period was normal movement about the premises.[29] The only "evidence" in the

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[28]From 2:35 p.m. on August 26 (R. 525) until 1:05 p.m. on August 25 (R. 200-201). See also R. 123.

[29]"THE COURT: Q. You have already said that you saw two of them in the yard and they were standing there and had play clothes on.

Now, did you see these two defendants before you had gone to the others do anything further?

THE WITNESS: A. Nothing except come out of the house." (R. 118).

* * * * *

"Q. . . . During that period that you had them under surveillance, what if anything did you observe them do? A. They were in the yard there talking together.

Q. Anything else? A. Roaming around together, came out of the house together.

Q. You saw nothing else? A. Nothing else that I recall." (R. 119).

* * * * *

"Q. You say that your agents were reporting to you from 6 a.m. that day? A. Yes, sir.

Q. What they observed and what they saw? A. Yes, sir.

Q. What did they tell you they saw the defendant Shirley Kremen do, if anything? A. I don't recall that they reported anything during that period.

agents' possession *before*[30] the arrests was a belief that the petitioners were "all living together" (R. 117)[31] and it is on this basis, and on this basis only, that the arrests of Kremen and Coleman must be justified. Thus the government is forced to contend that the mere presence of petitioners Kremen and Coleman in the same house with the fugitives is enough to justify their arrests.[32] But the law is clearly to the contrary (*infra*, p. 33-35).

Q. The same question as to the defendant Coleman; what is your answer? A. I don't recall that they reported anything." (R. 132-33).

* * * *

"Q. . . . What had been the general nature of the activity of the other persons that you had seen . . .? A. They came out as I would say people would normally come out of a place and talk among each other, relax on their various terraces or in chairs . . ." (R. 195).

[30]The evidence recited by the government in its Brief in Opposition (*supra*, pp. 14-16) respecting the rental of the cabin by Kremen, the purchase of food, etc., the traveling together of Coleman and Thompson, was obviously not known to the officers at the time of the arrests and was not the result of the surveillance which led to the arrests. This evidence was all developed *after* the arrests and obviously from investigations initiated on the basis of information obtained during the course of the unlawful search and seizure. See, e.g., R. 642-3; 782; 571; 580; 692; 707.

[31]Actually, this conclusionary testimony of the agent was stricken by the trial court (R. 117-118) and, in his subsequent answer, the witness made it clear that he must have reached this conclusion *after* the arrests when he had an opportunity to inspect the house which "looked like it was lived in". (R. 118).

[32]Indeed the inescapable logic of the government's position is that the agents would have been justified in arresting *anyone* who had been found in the presence of the fugitives—including the realtor who might have come up to collect rents, or even a casual guest. To say that such a person would have been released when subsequent investigations established his "innocence" is to reveal the illegality of the initial arrests, which the law requires to be justified by what the officers knew before or at the time of the arrest, and not by what they learned afterwards. *United States v. Di Re*, 332 U.S. 581, 595; cf. *Byars v. United States*, 273 U.S. 28, 29.

In any case, there was absent any "likelihood" of escape, an element also required by 18 U.S.C.A. 3052 before an arrest without warrant may be made by an FBI agent.[32a]

1. The principles against which the lawfulness of the arrests must be tested.

a. The Fourth Amendment.

Although the Fourth Amendment has been invoked most frequently in cases involving unreasonable searches and seizures, it is clear that its guarantees are equally applicable to unreasonable arrests. *Worthington v. United States,* 116 F.2d 557, 562 (6 Cir.); *Wrightson v. United States,* 222 F.2d 556, 59 (D.C. Cir.); cf. *Albrecht v. United States,* 273 U.S. 1, 5; *McGrain v. Daugherty,* 273 U.S. 135, 156; *United States v. Di Re,* 322 U.S. 581, 595; *United States v. Rabb,* 141 F.2d 45 (3 Cir.).[33] Thus, the standards which have developed in the cases to test the reasonableness of a search or seizure under the amendment, may be properly considered in the determination of whether an arrest is subject to the condemnation of the amendment.

[32a]The powers of FBI agents in this regard are considerably more circumscribed than are the powers of federal marshals and their deputies. Cf. 18 U.S.C.A. 3053 which does not impose the additional requirement of "likelihood" of flight upon arrests made without warrants by marshals.

[33]"The history and development of the Fourth Amendment show that it guarantees the right of the individual to be secure in his person against unreasonable arrests, as well as against unreasonable searches of houses and seizure of papers and effects. See 'The History and Development of the Fourth Amendment to the United States Constitution', Lasson, Series LV No. 2 of the Johns Hopkins University Studies in Historical and Political Science, 1937, and in particular pp. 35, 95, 117 and 132 and the authorities and notes cited therein." (*United States v. Rabb,* 141 F. 2d at 46, n. 1).

We discuss those standards below at pages 37 to 57. We submit here that the application of such standards to the facts revealed by this record, requires that the arrests of petitioners Kremen and Coleman be stricken down as unreasonable and therefore as contrary to the provisions of the Fourth Amendment; their convictions therefore must be reversed.

b. The rules and the statute.

In any case, the federal rules and statute prescribe with particularity the circumstances under which arrests may be made. Tested by the requirements of those rules and statutes, these arrests cannot stand.

(1) The rules.

The rules require that before an arrest warrant issue, there be a showing by a complaint "upon oath" (F.R.Crim.Pro., Rule 3) that "there is probable cause to believe that an offense has been committed and that the defendant has committed it . . ." (F.R.Crim.Pro., Rule 4). That, of course, was not done here: at least so far as petitioners Kremen and Coleman are concerned.

These rules, it has been said, go to the "very heart of due process of law, and, more directly [to] the essence of the Fourth Amendment" (*Wrightson v. United States,* 222 F.2d 556, 558. (D.C. Cir.). They require a "factual showing that the officers at the time of the arrest had probable cause to believe" that the defendants had committed the crime (*Ibid.,* at 560). In the absence of such a "factual showing" by the officers, the arrest is invalid. No such showing was, or

could have been, made here with respect to petitioners Kremen and Coleman.

(2) The statute.

While the statute (18 USCA 3052) permits agents of the Federal Bureau of Investigation to make arrests without warrant "... for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony" *and* if there is a "likelihood" of escape, the safeguards surrounding such arrests are no less than those required to be observed in order to obtain a warrant (cf. *Wrightson v. United States, supra,* at 559); and the same "factual showing" is therefore required in the case of an arrest without warrant as is required to obtain a warrant.

In making an arrest without warrant, the arresting officer must, before the arrest, have personal knowledge of evidence which would be competent and admissible on a trial and which, if submitted to a magistrate, would be sufficient to justify the issuance of a warrant. *Worthington v. United States,* 162 Fed. 2d 557 (6 Cir.); cf. *Johnson v. United States,* 333 U.S. 10, 15.

In *Coplon v. United States,* 185 Fed. 2d 629 (2 Cir.) cert. den. 342 U.S. 920, the Court concluded, from a review of the legislative history of Section 3052, that "Congress has always been grudging in its grant of this power [to arrest without warrant] to the Bureau ..." (185 Fed. 2d at 635), and that the statute conferred

upon agents of the Bureau no greater authority to arrest without warrant than is possessed by "private persons in any state in which they acted" (Ibid., at 634).

In California, where these arrests took place, the statute permits private persons to make arrests without warrant only for "a public offense committed or attempted in his presence", or "when a person arrested has committed a felony", or "when a felony has been in fact committed, and [the person making the arrest] has reasonable cause for believing the person arrested to have committed it". (California Penal Code, §837.) The California cases require that one making such an arrest be able to testify of his own knowledge to sufficient facts to show that the case comes within the purview of statute. *People v. Craig,* 152 C. 42, 46; *People v. Yee,* 145 A.C.A. 607 (Calif.); *People v. Brite,* 9 C.2d 666, 668.

2. Tested by the foregoing principles, the arrests were invalid.

Substantially, what the legislation just considered requires is that when an arrest is made without a warrant, the arresting officer have, *at the time of the arrest,* sufficient personal knowledge, reasonably to justify a belief that an offense has been committed and that the person he is arresting has committed it.

As to appellants Kremen and Coleman, the record is barren of any intimation that the officers had or could have had such personal knowledge. Indeed, the officers did not even know the identity of Kremen and Coleman before the arrests were made (R. 273-274), and all of

the information which they secured concerning those petitioners, save the fact that they were in the presence of the fugitives, was developed as a result of the search which occurred *after* the arrests.

Thus, here, as in *Johnson v. United States,* 333 U.S. 10, "the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest" (333 U.S. at 16). As this Court said there:

> "This will not do. An officer gaining access to private living quarters under the color of his office and the law which he personifies *then* must have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law." (333 U.S. at 17; italics added)

Nor will it do to suggest, as the government does (Br. in Opp. 10), that because petitioners Kremen and Coleman were in the presence of the fugitives, the officers had probable cause to believe that these petitioners were accessories after the fact to Thompson's offense.[34] The law is clear that more is required to make out

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[34] A similar contention was rejected by this Court in *United States v. Di Re,* 332 U.S. 581 where it was said: "Presumptions of guilt are not likely to be indulged from mere meetings . . . Any inference that anyone on the scene of a crime is a party to it must disappear if the government informer singles out the guilty person" (332 U.S. at 593-594). Here the government agents singled out Thompson and Steinberg as the fugitives (R. 197, 323) and any inference that the others at the scene were a party to the crime must therefore disappear.

accessoryship than merely being in the presence of the fugitive.

> "General malevolence is not enough if the specific knowledge required by the statute is lacking (8 Cir.)." *Fulbright v. United States,* 91 F.2d 210.

Cf. also *United States v. Perlstein,* 126 F.2d 789 (3 Cir.); *United States v. Ausmeier,* 152 F.2d 349 (2 Cir.); and see *United States v. Pincourt,* 159 F.2d 917, 920 (3 Cir.).

In *Fulbright, supra,* it was held that

> "Knowledge that the fugitives were evading officers in general or that a state government had issued warrants for their arrest is immaterial. Such acts are beyond the purview of the statute . . . Every circumstance pointed out is consistent with knowledge that [the fugutives] were criminals, but it is equally consistent with appellant's ignorance of outstanding warrants for their arrest." (91 F.2d at 213-214)[35]

The government conceded, indeed it argued, on the trial, that "absolutely necessary" to its case was proof "that the defendants knew Robert Thompson had committed an offense" (R. 849-850); and it has, inferentially at least, here admitted that *scienter* or "mental state" is an essential element of the accessoryship offense (Br. in Opp. 14).

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[35]The government's suggestion (Br. in Opp. n. 16) that petitioners' reliance on *Fulbright* is "misplaced", since "petitioners failed to introduce any evidence" as to why Thompson and Steinberg were being "hidden", lacks merit for two reasons. First, it assumes the very fact at issue: that the fugitives were being "hidden". Second, it seeks to transfer to petitioners the burden of proving their innocence, rather than leaving the burden of proving their guilt where it belongs—on the prosecution.

Clearly there is no evidence in this record which would justify a finding that any officer had, prior to the arrests, observed anything upon which he could have based a reasonable belief that petitioners Kremen and Coleman had the requisite mental state or *scienter*. Certainly there is no evidence which resulted solely from the pre-arrest surveillance to show that either of these petitioners had any guilty knowledge or intent. *United States v. Di Re,* 332 U.S. 581, 592. Thus in the absence of any evidence which would afford the foundation for a reasonable belief that these two petitioners were in fact committing the felony of accessoryship, their arrests, based merely on their presence at the cabin, were unlawful.

In any case, the provisions of 18 U.S.C.A. 3052 apply only when there is a "likelihood" of escape. The statute requires *both* reasonable grounds to believe that a felony has been committed *and* reasonable grounds to believe that there is a likelihood of escape. Thus, even if the argument heretofore made, that there were no reasonable grounds to believe that a felony had been or was being committed, is held inapplicable, there still must be a showing that there were reasonable grounds to believe that flight was likely. The evidence, summarized above, relating to the conduct of petitioners at the cabin demonstrates that there were no grounds whatsoever for such a belief. Indeed no officer ever asserted that he had such a belief. The arrests, therefore, were invalid and cannot justify the subsequent searches.

The government relies (Br. in Opp. 9-10) on *Brinegar v. United States,* 338 U.S. 160, and *Carroll v.*

United States, 267 U.S. 132, to justify these arrests. However, those cases afford no support for its position here. Regarded as they were by this Court as being very close to the borderline and decided over vigorous dissents, they presented factual situations far removed from that at bar. They dealt not with claimed infringements of constitutional rights by reason of arrests in "the house or other place of privacy . . ." as does this case; to the contrary, they dealt only with a claim of "freedom to use public highways in swiftly moving vehicles for dealing in contraband, and [a claim] to be unmolested by investigation and search in such movements" (*Brinegar v. United States,* 338 U.S. 176, 177). Their holdings were limited to the precise facts which they presented. It clearly was not contemplated even by the narrow majorities deciding them, that these cases would justify the arrests without warrant of persons pursuing normal and apparently peaceful activities at their homes "or other place[s] of privacy". The government has cited no good reason for extending the holdings of cases dealing with the arrests of persons using swiftly moving vehicles to transport contraband along public highways to the facts of this case.

If these petitioners—just because some of them later turned out to be "Communists"—were not free of arrest without warrant in their summer home, then no American similarly situated is.[36]

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[36] ". . . the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the bundle, we also cast aside protection for the liberties of more

The unlawful arrests of petitioners Kremen and Coleman must lead to a reversal not only of their convictions, but, since that unlawfulness also destroys the only basis upon which the government seeks to justify the subsequent search and seizure without warrant, it therefore invalidates the conviction of Steinberg as well. The searches of all three petitioners, the indiscriminate seizure of their papers and effects, and the introduction of the whole mass into evidence against all of them, requires a reversal of all the convictions. For the fruits of the illegal arrests of Kremen and Coleman were used against Steinberg, too. "All [the] evidence" was offered by the government "against all defendants" (R. 901) and was so received by the trial judge (R. 75). Evidence which is tainted by the illegality of the arrests of Kremen and Coleman, was used to convict Steinberg. In such a case the constitutional guaranty is extended to all and no fine distinctions will be drawn to exclude any from its protection. *McDonald v. United States,* 335 U.S. 452; *United States v. Thompson,* 113 F.2d 643 (7 Cir.). Steinberg, too, is therefore entitled to a reversal of the judgment against him.

(B) THE SEARCHES OF ALL PETITIONERS AND THE PREMISES AND THE SEIZURE OF THEIR BOOKS, PAPERS AND EFFECTS, ALL WITHOUT WARRANT, VIOLATED THEIR CONSTITUTIONAL RIGHTS.

1. The facts of the search.

As we have already seen, preparations for the "raid" began sometime prior to August 25, 1953. (R. 395, 529).

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worthy critics who may be in opposition to the government of some future day" (Mr. Justice Jackson, as Circuit Justice, in *Williamson v. United States,* 184 F. 2d 280, 284 [2 Cir.]).

Thus two FBI agents, who, through previous surveillance could have been expected to identify Steinberg and Thompson, left New York City in plenty of time to arrive in San Francisco on August 25 and to participate in the arrests of all petitioners two days later (R. 352, 438). On August 25 at least three FBI agents left San Francisco for the Twain Harte area bearing photographs of Thompson and Steinberg (R. 537). Between 4 and 5 p.m. on August 26, five more FBI agents left San Francisco to participate in the arrests which took place the next day (R. 273).

From 2:35 p.m., August 26 (R. 525) until the time of the arrests at 1:00 p.m. on August 27, FBI agents had the premises under surveillance (R. 195). From 5:00 a.m. on August 27 until the arrests eight hours later, a group of five FBI agents maintained a constant vigil there from vantage points on a nearby hillside (R. 133, 271). There is no evidence to indicate that anyone on the premises was seen doing anything except normally moving about the premises (R. 117, 119-120, 195).

For at least seven hours these agents were in communication with the agent in charge of the operation via a two-way radio, relaying information and receiving instructions (R. 197). There were no reports from the observing agents to their superior that anyone was doing anything except walking about, conversing and engaging in normal activities (R. 133).

At about 12:45 p.m. that afternoon, the agents received instructions to stand by to assist a party of FBI agents who would soon approach by automobile (R. 197-

198) to effect the arrest of Thompson and petitioners. Simultaneously with the arrival of six automobiles (R. 95) containing fifteen or sixteen agents and a matron,[37] the agents stationed on the hillside converged upon the dwelling (R. 200, 274). As the raiding party descended upon the house with drawn guns, the agent in charge announced that the members of the arresting group were from the FBI.

Thompson and petitioner Steinberg were arrested outside the house (R. 96). While neither of them was served with a warrant (R. 349, 439), they were told that they were under arrest for violations of the Smith Act (R. 329, 342). Petitioners Kremen and Coleman were arrested inside the house (R. 97). There were no warrants for their arrest (R. 100).

There were no efforts to avoid submission to or to prevent arrest, nor were there any efforts to escape (R. 277). No weapons were found (R. 107).

Petitioner Kremen's person was searched by the matron inside the house. Eventually Kremen and Coleman were taken out into the yard with Thompson and Steinberg and told they were under arrest for harboring (R. 101). In the yard, all except appellant Kremen were subjected to personal search, fingerprinted, photographed and handcuffed (R. 101-102).

While the arrested persons were held outdoors, agent Erickson searched all the rooms and the closets in the

[37] Arrangements had been made to bring along a matron (R. 275-276), indicating, as does everything else discussed above, that the agents had knowledge, in ample time to secure warrants, of the fact that they were going to make arrests. Cf. *United States v. Coplon*, 185 F.2d 629, 635 (2 Cir.), cert. den. 342 U.S. 920.

entire house (R. 210-212). He read and examined papers and documents from boxes, suitcases, brief cases and desk drawers located in different rooms in the house (R. 210-212, 288, 312). Then he went outside to two automobiles located in the parking area and searched them (R. 212).

In the absence of the prisoners, who had been driven to San Francisco for arraignment, there was a mass seizure and removal of ". . . whatever was there . . ." (R. 103), of "everything . . . except that which the realtor handling the house identified as the property belonging to him" (R. 286).

Agent Erickson took personal charge of the boxes and suitcases containing papers, and drove them to San Francisco for a more detailed study and search (R. 215, 289). Other agents seized and removed hundreds of items listed in exhaustive detail on the 25-page inventory already referred to (Ex. A; R. 109), and transported them in bulk to San Francisco. A belt containing money and two bill folds with their contents were removed from trousers found in the living room (R. 378-379). Papers were removed from a desk in the same room (R. 374-375). Four or five FBI agents remained on the premises until midnight, August 27 (R. 390).

Five days later, on September 2, 1953, an agent returned to an outhouse and secured fingerprints from beer cans in a garbage can (R. 384-387).

No search warrant of any kind was sought or secured prior to the search and seizure conducted on August 27, or prior to the search on September 2, or at any other time (R. 105-106, 404).

The principal objects of the search were the papers and documents found in the dwelling (R. 213). The great bulk of the exhibits presented by the government were secured as a result of these searches (R. 297), and the bulk of the government's evidence came from leads developed from its examination of these documents (see n. 30, *supra*). The unlawfulness of this search was timely raised by motion (R. 22-23) and was supported by testimony offered in the course of the hearing on the motion (R. 89-138, 164-180). Objections to the introduction of the illegally obtained evidence were pressed throughout the trial (R. 202, 204, 216, 217, 219, 220, 228, 231).

2. The constitutional principles applicable to the searches.

At this late date it should require no great collection or citation of authorities to demonstrate that the protection against unreasonable searches and seizures contained in the Fourth and Fifth Amendments "affect the very essence of constitutional liberty and security" (*Boyd v. United States,* 116 U.S. 616, 630 [referring to Lord Camden's opinion in *Entick v. Carrington,* 19 How. St. Tr. 1029]), and are as important to the maintenance of the American constitutional system as are the other great guarantees of individual liberty—right to trial by jury, habeas corpus, and due process. *Gouled v. United States,* 255 U.S. 298.[38]

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[38]The *Boyd* opinion, *supra*, contains a scholarly review of the history of the amendments and demonstrates how the concepts they embody resulted from the struggle both in England and the colonies against the despotic "writs of assistance", which were being employed by an authoritarian state to crush the liberties of the peoples. (116

The amendments therefore are not to be "narrowly or begrudgingly applied" (cf. *Quinn v. United States*, 349 U.S. 155, 162), rather they are to be "liberally construed to prevent impairment of the protection extended" (*Grau v. United States*, 257 U.S. 124, 128). Their effect is to put all federal officers under their restraints to the end that the people will be forever secure in the rights which they guarantee. Their protection reaches all, those who are accused of crime as well as those who are not, and the duty of giving full effect to their provisions falls upon all those entrusted with the enforcement of the federal law. *Weeks v. United States*, 232 U.S. 383, 391-392.

3. Tested by the foregoing principles, the searches were invalid.

The salutary policy of the amendments condemns a search without a warrant unless it is "incident to a valid arrest" or unless the search can be justified by "special circumstances." *United States v. Jeffers*, 342 U.S. 48, 51. In making a claim that a case falls within either of these two exemptions, the government is required to discharge a heavy burden. *McDonald v. United States*, 335 U.S. 451. It has not done so here.

U.S. at 625-631). See also *Weeks v. United States*, 232 U.S. 383; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385; *United States v. Lefkowitz*, 285 U.S. 452; *Go-Bart Importing Co. v. United States*, 292 U.S. 344; *Davis v. United States*, 328 U.S. 582; *Johnson v. United States*, 333 U.S. 10; *McDonald v. United States*, 335 U.S. 451.

The fact that the constitutions of the several states "uniformly" impose restraints on state action as to searches and seizures which are "identical with or similar to" those imposed on federal action by the federal constitution (47 Am. Jur., Searches & Seizures, 58) demonstrates the pervasiveness of these concepts in the American constitutional system. See *Agnello v. United States*, 269 U.S. 20, 33. The state cases are collected in 47 Am. Jur., *supra*, 507, n. 6.

We have already shown why, as to petitioners Kremen and Coleman, there was no valid arrest. Assuming, however, that there was a valid arrest of Thompson or of petitioner Steinberg outside the house, that fact alone gives no justification for the search of the remaining petitioners or of the house, the automobiles, or the outhouse.

a. The searches do not fall within the narrow scope of the "incident to arrest" exemption.

A search based on the "incident to arrest" theory must be genuinely incidental to the arrest. The vitality of the constitutional amendments would be wholly sapped if a search such as was here conducted were upheld merely because there had been a valid arrest. For this reason, this exception has been closely hedged about by limitations and conditions which impose rigid requirements respecting the place, the time, and the purposes of searches alleged to be incidental to arrests.

(1) The Place

Ever since the decision in *Agnello v. United States*, 269 U.S. 20, the explicit rule[39] has been that a search of a dwelling is incidental to a valid arrest only where the arrest occurred inside the dwelling house. Mr. Justice Butler, speaking for the Court in that case, said:

> "... one's house cannot lawfully be searched without a search warrant, except as an incident to a law-

[39]The rule was clearly implicit in the earlier cases. *Boyd v. United States*, 116 U.S. 616; *Weeks v. United States*, 232 U.S. 383; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385; *Gouled v. United States*, 255 U.S. 298.

ful arrest *therein.*" (296 U.S. at 32; italics added.)

The history of the amendments to which we have already adverted (*supra,* notes 33, 38) makes it clear that it was the unauthorized search of the private citizens' home which was the chief evil sought to be remedied. For this reason it has been held that the search of a private dwelling without warrant is "in itself" unreasonable and abhorrent to law. *Agnello v. United States,* 269 U.S. 20; *Papini v. United States,* 84 F. 2d 160 (9 Cir.); *Worthington v. United States,* 166 F. 2d 557, 562 (6 Cir.). It is precisely in cases where there has been a search of a private dwelling without warrant that the burden of showing "special circumstances" is thrust most heavily upon the government. *McDonald v. United States,* 335 U.S. 451, 456; *United States v. Jeffers,* 342 U.S. 48, 51.[40]

In *Baxter v. United States,* 188 F. 2d 119 (6 Cir.) officers had received information, some six hours before the arrests, that an appellant was storing whiskey in his house. Without securing a warrant, they went to the premises and stationed themselves in a nearby field from which they observed a truck being loaded with cartons taken out of the house. After one of the cartons was dropped and the officers smelled whiskey, they arrested one appellant at the rear of the truck. Then they entered the house, arrested the other appellant therein

[40] Where a dwelling is searched without a warrant the court will examine the record with greater care than when a place of business is involved. Cf. *Davis v. United States,* 328 U.S. 582, 592-3; *United States v. Robinowitz,* 339 U.S. 56, 64.

and undertook a search of both the truck and the house and found contraband whiskey. A conviction was reversed on the ground that the entry into the house, the arrest of the appellant found therein, and the search thereof were unlawful and "plainly violated Section 2236, 18 USCA".[41] (188 F. 2d at 120). The Court of Appeals pointed out that the case was not one of a rapidly moving automobile nor did it present any emergency situation requiring immediate action. It noted that the officers had received the information on which they acted at least six hours prior to the time of the arrests and search; that there was a United States Commissioner available, and that it was "clearly feasible" for them to apply for the necessary warrants.

Except for the fact that in the *Baxter* case the defendants were bootleggers, and that in this case the petitioners are claimed to have harbored Communists, the cases are indistinguishable. Applying the law of the *Baxter* case to the facts of this case, it is clear that there was no justification for the search of the house, the outhouse, or the automobiles merely by virtue of the arrest of Thompson and petitioner Steinberg outside the house.

There is no precedent whatsoever for the proposition, urged by the government, that a search of a private dwelling without warrant may be justified by arrests which occurred outside the dwelling.

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[41] 18 U.S.C.A. 2236 makes it illegal to search "any private dwelling used and occupied as such dwelling without a warrant". By its terms it does not apply to any person serving an arrest warrant or arresting or attempting to arrest a person committing or attempting to commit an offense in the presence of the officer or one who is suspected on reasonable grounds of having committed a felony.

The high purposes of the Fourth and Fifth Amendments counsel that this Court should not approve the extension, here sought by the government, of the limited power to search dwellings without warrant.

(2) The Time

A search incident to a valid arrest must occur *contemporaneously* with the arrest. *Agnello v. United States,* 269 U.S. 20; *United States v. Lee,* 83 F. 2d 195, 196 (2 Cir.); *Papini v. United States,* 84 F. 2d 160, 163 (9 Cir.); *Steeber v. United States,* 198 F.2d 615 (10 Cir.). Undoubtedly the requirement of contemporaneity has been imposed in order to assure that the victims of the search be present at the time of the search and that the officers not proceed "surreptitiously" or by stealth. *United States v. Jeffers,* 342 U.S. 48, 52.

While the entire process of ransacking the house following the arrest and removal of petitioners was illegal, the search most obviously outlawed by the lapse of time was the search of the outhouse which was conducted five days after the arrests and while petitioners were in custody in San Francisco. This "beer can search" was commenced by a trespass and an illegal entry,[42] and was tainted with illegality throughout. The evidence so obtained clearly should have been suppressed. No excuse whatsoever for this search without warrant can be possibly shown. The fact that such a search occurred at all highlights the unwillingness of the agents involved to

[42]No permission was sought or obtained from petitioner Kremen who was the lawful lessee of the premises when this search took place (R. 138).

recognize the procedural requirements of the Fourth and Fifth Amendments.

(3) The Purpose

As in the case of an arrest without warrant, the right to search without warrant must be determined by the situation which is disclosed to the arresting officers before the search is made. *Weeks v. United States,* 232 U.S. 383; *Byars v. United States,* 273 U.S. 28, 29. It is on the basis of the facts known to the officers at, or prior to, the time of the search that the purpose of the search is revealed. That purpose, as so revealed, must be a lawful one. If, at the threshold of the search, the purpose of the officers appears not to be reasonable or lawful, then the search, despite the existence of a valid arrest is illegal.

Thus a search may not be conducted for the purpose of making possible future arrests (*Taylor v. United States,* 286 U.S. 1, 6; *Papini v. United States,* 84 F.2d 160, 163 [9 Cir.]), or, under the guise of being incidental to an arrest, for the purpose of procuring evidence against the defendant. (*Henderson v. United States,* 12 F.2d 528 [4 Cir.]); *McKnight v. United States,* 183 F.2d 977 [D.C. Cir.]). Such an illegal purpose condemns the search from the beginning irrespective of what it turns up. *Bushouse v. United States,* 67 F.2d 843 (6 Cir.); *Takahashi v. United States,* 143 F.2d 118 (9 Cir.).

Here the purpose plainly was to seize evidentiary materials which might be used against petitioners to convict them of crimes with which they had not yet been

charged. This Court has invalidated such rummaging, general searches for evidentiary materials. *Go-Bart Importing Co. v. United States,* 282 U.S. 344; *United States v. Lefkowitz,* 285 U.S. 452. In *Lefkowitz* this Court said:

> "Here the searches were exploratory and general and made solely to find evidence of respondent's guilt of the alleged conspiracy or some other crime. Although intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the government, to discover property concealed in order to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglar's tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime." (285 U.S. at 454.)

Even where the officers have a valid warrant or make a valid arrest, such a rummaging search is condemned.

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed the warrant would give more protection for presumably it must be issued by a magistrate. . . . Nor should we forget that what seems fair enough against a squalid huckster of

> bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." (*United States v. Kirschenblatt,* 16 F.2d 202, 203 [2 Cir.].)

How prescient Learned Hand was thirty years ago!

The government's reliance (Br. in Opp. 11-12) upon *United States v. Rabinowitz,* 339 U.S. 56, *Agnello v. United States,* 269 U.S. 20, *Marron v. United States,* 275 U.S. 192, and *United States v. Lindenfeld,* 142 F.2d 829 (4 Cir.) cert. den. 323 U.S. 761, is misplaced.

Rabinowitz is an instance of a *narrow* search, within an *office* upon the basis of an *arrest made therein* under a *valid warrant;* the *purpose* of the search was *specific:* for items which *in themselves were criminal to possess.* The Court specified in detail the bases upon which it held the search valid:

> "We think the District Court's conclusion that here the search and seizure were reasonable should be sustained because: (1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money."
> (*United States v. Rabinowitz,* 339 U.S. at 64.)

None of these factors was present in this case.

Even in the face of the strong facts of the *Rabinowitz* case, the majority there was careful to point out that the

> "... law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right to privacy within the broad sweep of the Fourth Amendment." (339 U.S. at 66.)

Agnello v. United States, 269 U.S. 20, appears to be of no help whatsoever to the government, for there a conviction was *reversed* because an arrest at one place was followed up by a subsequent search at another. There, as here, the defendants had been arrested and were "in custody elsewhere" (269 U.S. at 31) at the time of the search. Such a search, said the Court, "cannot be sustained as an incident of the arrest" (*ibid.*).

Marron v. United States, 275 U.S. 192, and *United States v. Lindenfeld,* 142 F.2d 829 (2 Cir.) like *Rabinowitz* present situations totally different from that at bar. In *Marron* the officers had gained access to the premises by virtue of a search warrant (275 U.S. at 193) and, after entry, had actually observed the law being violated, i.e., intoxicating liquors being sold to patrons (275 U.S. at 194). Thus there could have been no question in that case, as there is here, of the validity of either the search or the arrest. In addition, in *Marron* the officers seized only "things used to carry out the criminal enterprise" (275 U.S. at 199). Here the officers did not so limit themselves: they searched all of the rooms and closets of the entire house; they read and examined papers and documents from boxes, suitcases, brief cases and desk drawers located in different

rooms throughout the house; they thoroughly searched two automobiles located in the parking area outside the house. Later, in the absence of petitioners,[43] they seized and removed "everything . . ." (R. 286). This mass of material was then loaded into the officers' automobiles and driven to San Francisco for study and analysis, and that which the government believed had evidential value was introduced against petitioners. About a week later, the officers returned and made a still further search for fingerprints. There was no showing that the material so seized was contraband, or criminal to possess, or was used to carry out the crimes with which petitioners were charged, or any crime. Nothing in *Marron* can conceivably justify searches and seizures of this sweeping character.

In *United States v. Lindenfeld,* 142 Fed. 2d 829 (2 Cir.), the search was an incident to an arrest which was lawful because the officers observed the actual commission of the crime (149 F.2d 831). The search itself was lawful because it was limited to prescription cards which the defendant doctor was required by law to keep and which he used for the unlawful purpose of concealing his crimes. The cards were therefore not merely evidence of the crime, but were actually part and parcel of the criminal enterprise itself. The Court pointed out that in terms of time and area, the search was reasonably limited and that there was not an "exhaustive and minute combing of the premises" such as was found in the *Go-Bart* and *Lefkowitz* cases. Nor, it

[43]In *Marron* it is clear that the search and seizures were made in the presence of the person arrested (275 U.S. at 194, 199).

observed, was there any "thorough ransacking of the house" (142 F.2d at 833) such as the record here reveals. The difference between the kind of material seized in the *Lindenfeld* case and that which was seized here, as well as the difference between the search there and the ransacking which occurred here, demonstrates why that case is far from controlling here, and why its holding should not be extended to cover the facts of this case.

b. There were no exceptional circumstances which justified the search without warrant.

The doctrine that "exceptional circumstances" may sometimes justify a search without warrant (cf. *Johnson v. United States,* 333 U.S. 10, 14), stemming from *Carroll v. United States,* 267 U.S. 132, affords no justification for the holding below.

In the *Carroll* case this Court had before it the question of whether a search and seizure without warrant, made pursuant to legislation specifically authorizing such action in cases involving contraband liquor being illegally transported by motor vehicle in violation of prohibition laws (Section 26, Title II, National Prohibition Act, 41 Stat. 315; 27 U.S.C.A. 40), was consistent with the requirements of the Fifth Amendment. As the lengthy opinion of Chief Justice Taft indicates, the Court was deeply conscious of the difficult problem posed by even this question and resolved it in favor of the government only insofar as the statute was applied to "contraband goods concealed and illegally transported in an automobile or other vehicle" (267 U.S. at

153). Justices McReynolds and Sutherland dissented, believing that

> "... the damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods" (267 U.S. at 163).

The fact that the search in *Carroll* was authorized by an act of Congress has been regarded as a matter of prime significance in explaining that decision; it has been recognized that the Court was "reluctant" to hold that a search authorized by an act of Congress was unreasonable, thereby rendering the legislation itself unconstitutional. *United States v. Di Re,* 332 U.S. 581, 585. *Carroll* has not been read as meaning that absent such legislation, even the search there conducted would have been sustained. In the case at bar there is no such special legislative grant of authority which can be used to buttress the argument that the search here was reasonable.

Indeed, such legislation as governs the situation at bar, far from authorizing these searches and seizures, condemns them. 18 U.S.C.A. 3107 provides that agents of the Federal Bureau of Investigation are "empowered" to make seizures "under warrant" for violations of law. We know of no legislation which empowers those agents to engage in such a search and seizure without warrant. And F. R. Crim. Pro., Rule 41, spells out in detail what is required before a search warrant may be obtained. Clearly, the agents here bypassed the requirements of the statute and the rule for fear that compliance would have made impossible the

wholesale ransacking and seizure in which they obviously intended to engage once the arrests were effected. They were determined to obtain evidence which they thought would assure convictions and they did not propose to let statutes or rules (or the Constitution itself) stop them.

But apart from the question of legislative authorization, the *Carroll* search involved only the transportation of contraband on public highways in swiftly moving vehicles.[44] Those were the "exceptional circumstances" without which, even in the face of the legislation, the Court would, as its opinion indicates, undoubtedly have had serious questions about the legality of the search. See *Brinegar v. United States,* 338 U.S. 160, 176. No such facts exist here, and there is no reason why the *Carroll* ruling should be extended to cover this totally dissimilar situation.

Later cases have pointed up the nature of the "exceptional circumstances" which might conceivably justify a dilution of the precious guarantees of the Fourth and Fifth Amendments. They have intimated that possibly the search of a moving vehicle as distinguished from permanent premises may excuse a search without warrant; or that if officers have reason to apprehend violence or to believe that evidence may be removed, concealed or destroyed, or that suspects are likely to flee, they may proceed without warrant. *Johnson v. United*

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[44]Indeed, in *Carroll* and related cases the car itself was the "indispensable instrumentality" of the crime, and to that extent was itself the "offender and became contraband" (*United States v. Di Re,* 332 U.S. 581, 586).

States, 333 U.S. 10, 15; *Jeffers v. United States*, 342 U.S. 48, 52. The evidence here establishes that there was no show of violence by petitioners, no resistance to the arrest, no attempted flight, and no effort to remove, conceal or destroy property (R. 107, 277). Thus there is no occasion for the government to seek to bring this case within the scope of these observations.

While the fact that a suspect was "fleeing or able to take flight" may possibly justify the arrest or search of that person (*Johnson v. United States*, 333 U.S. 10, 15), it has never been suggested that that circumstance would condone the indiscriminate arrest and search of all who were at the scene with him, or the indiscriminate subsequent search of the premises, parked automobiles, and outhouses—all without warrant. Certainly no such "emergency" can justify the search of the outhouse here, five days after the arrest. The "flight" exception, even if the government should urge it because two of the persons arrested were fugitives, cannot be extended to condone everything that was done here.

It is questionable, in any case, whether that exception does apply here. The "flight" contemplated must obviously be a flight which the officers reasonably apprehend at the time of the arrest. Otherwise, all suspected fugitives, and presumably all others charged jointly with them, will as a class be excluded from the protection of the Constitution. A situation of flight or projected flight prior to the arrests and searches is not presented on this record. Here, all those arrested apparently were well established at the cabin and, for aught that appeared to the officers, they were settling

in for a long summer stay. There is no evidence that prior to or contemporaneously with the arrest there were any indications of flight on the part of anyone (R. 277).

In any case, the officers could easily have prevented any flight (or the removal or destruction of property properly subject to seizure) by obtaining warrants in advance or by guarding the premises until one of their number had obtained warrants. *United States v. Jeffers*, 342 U.S. 48, 52; *United States v. Coplon*, 185 F.2d 629, 636-637 (2 Cir.). The record shows that there were more than enough officers involved to do either.

No reason can be given to justify the failure to obtain warrants save inconvenience to the officers and the slight delay that would be occasioned in order to prepare the necessary papers and present the evidence to a magistrate.[45] But it has been consistently held that this circumstance will not excuse "by-passing the constitutional requirement." *McDonald v. United States*, 335 U.S. 451, 455; *Johnson v. United States*, 333 U.S. 10, 15. The officers had, and took, ample time to make the extended preparations necessary for those arrests (see pp. 18-19, *supra*). There is therefore no occasion under the guise of a claimed emergency for depriving petitioners of the rights guaranteed to them under the Fourth and Fifth Amendments.

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[45]Pursuant to the provisions of 28 U.S.C.A. 631, there have been appointed in the Northern District of California, commissioners who are located at the following places: Alturas, Arcata (Eureka), Mineral (Lassen National Park), Modesto, Oakland, Redding, Sacramento, Salinas, San Francisco, San Jose, Stockton, Susanville, and Yosemite National Park. The places nearest to Twain Harte are at Stockton (*supra*, n. 16) and Modesto, about 60 miles away.

This Court has recognized time and again that

> ". . . the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests" (*United States v. Lefkowitz*, 285 U.S. 452, 464).

Contrary to the reiterated complaints of most law enforcement officers, such a procedure does not impede efficient law enforcement. It simply requires the enforcing agency to submit its evidence to judicial scrutiny before acting on it. It merely prevents the law enforcement officer from being the judge in his own cause.[46]

Because of the failure of the officers to comply with the procedural requirements of the Fourth Amendment and because of the introduction into evidence, contrary to the guarantees of the Fifth, of the evidence thus illegally obtained, the convictions against petitioners cannot stand and the judgments below must be reversed.

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[46] "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent" (*Johnson v. United States*, 333 U.S. 10, 14).

II.

SECTIONS 3, 371 AND 1071 OF TITLE 18 OF THE UNITED STATES CODE WERE UNCONSTITUTIONALLY APPLIED TO PETITIONERS IN THAT (A) PETITIONERS WERE PLACED IN DOUBLE JEOPARDY BY AN UNCONSTITUTIONAL PYRAMIDING OF OFFENSES; (B) SECTION 3 WAS CONSTRUED IN A MANNER CONTRARY TO THE COMMON LAW AND TO THE REQUIREMENTS OF THE FIFTH AND SIXTH AMENDMENTS; AND (C) THE SECTIONS WERE APPLIED TO PETITIONERS IN THE ABSENCE OF ANY EVIDENCE OF SCIENTER.

(A) PETITIONERS WERE PLACED IN DOUBLE JEOPARDY BY AN UNCONSTITUTIONAL PYRAMIDING OF OFFENSES.

At the time of the raid petitioners Kremen and Coleman were told that they were being arrested for "harboring" the fugitives (R. 101, 201), and petitioner Steinberg that he was being arrested on the basis of a warrant issued out of the Southern District of New York (R. 98, 201).[47]

The harboring offense is a violation of 18 U. S. C. A. 1071 and at the time of the arrests carried with it a maximum penalty of six months imprisonment and $1000 fine.[48] However, by the subsequent addition of a charge

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[47]That warrant (Exh. 120; R. 893, 900-901) charges a violation of the Smith Act. Steinberg has since been tried for that offense (*United States v. Trachtenberg et al.*, S.D. N.Y. No. C-136-7), and his conviction is presently pending on appeal to the Court of Appeals for the Second Circuit.

[48]On August 20, 1954, the statute was amended to increase the penalty to one year's imprisonment and $1000 fine, except if the warrant or process were issued on a felony charge, in which case the maximum punishment was fixed at five years imprisonment and $5000 fine (68 Stat. 747).

The legislative reports on the amendment (Sen. Rep. No. 2141, 83rd Cong., 2d Sess.; H. R. Rep. No. 1928, 83rd Cong., 2d Sess.) demonstrate an awareness that the only statute properly applicable to this very case was 18 U.S.C.A. 1071. This case was specifically cited and the reason urged for the amendment was that the then existing penalties were inadequate to deter persons from "concealing Communist

of accessoryship to Thompson's offense (18 U. S. C. A. 3) and of two charges of conspiracy,[49] the Government was able to obtain the return of an indictment which carried with it potential penalties of 8½ years imprisonment and $17,000 in fines for petitioners Kremen and Coleman, and slightly less than that for petitioner Steinberg. The sentences actually imposed, while not reaching these maxima, were all in excess of that which was permitted under 18 U. S C. A. 1071.

Petitioners contend that what was at most a single act of harboring was thereby permitted to become the basis for four separate and distinct offenses upon which they received consecutive sentences in contravention of their rights under the Fifth Amendment to the Constitution.[50]

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fugitives". Neither the reports nor the letter from the Attorney General attached thereto and dealing with this situation intimated that any other statute (certainly not the accessoryship statute or the conspiracy statute. [see *infra*, pp. 60-65]) was applicable.

[49] "... that darling of the modern prosecutor's nursery" (*Harrison v. United States*, 7 F. 2d 259, 263 [2 Cir.]).

Time and again our leading judges have inveighed against the use of the conspiracy concept to "sweep within the dragnet" those associated in any degree with the main offenders. *United States v. Falcone*, 109 F.2d 579, 581 (2 Cir., per Learned Hand, J.) See also Mr. Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 445-446.

[50] While petitioner Kremen's sentences were all concurrent, she received under the first two counts (the accessoryship count and the count charging the conspiracy to commit that offense) sentences in excess of what could have been imposed upon her under the harboring counts alone. Thus, as to her, if the argument below as to the invalidity of the accessoryship count and its conspiracy counterpart is sustained, the sentences imposed on those counts must be set aside.

1. The conviction of petitioners Kremen and Coleman on both the accessoryship and harboring counts is invalid or, in the alternative, the conviction of petitioners Kremen and Steinberg on the accessoryship counts must be reversed for lack of evidence to support it.

While this Court has permitted a single act or a series of acts to supply the basis for convictions for separate offenses, it has done so only "so long as each requires the proof of a fact not essential to the other." *Perreira v. United States,* 341 U. S. 1, 9. Here, however, by the very facts of the case, all of the proof which established the harboring of Steinberg also established the accessoryship after the fact to the Thompson conviction. Neither offense required the proof of any fact not essential to the other.

Certainly as to petitioner Kremen this is true. There is no evidence against her save and except that which deals with the rental of the house, the procurement of supplies, and the occupancy of the premises and its use by both Steinberg and Thompson. As to her, there was no additional fact which was proved or required to be proved with relation to Thompson in addition to that which was proved and required to be proved with relation to Steinberg. Every fact that was required to make out the charge of accessoryship was equally required to make out the charge of harboring.

As to petitioner Coleman, while the additional facts of his travels with Thompson in Missouri and Montana were adduced at the trial, they were not *required* to make out the accessoryship offense. That offense was complete, according to the government's theory, without any such evidence because the Government obtained

convictions against Kremen and Steinberg (and also Ross[51]) without any such additional evidence as it had offered against Coleman. Thus such additional evidence must have been unnecessary to establish the accessoryship offense, and it must be, on the government's theory, that the mere presence in the cabin was enough to make out the accessoryship.

If the government disclaims this theory, then it follows logically that the accessoryship convictions of Kremen and Steinberg cannot stand. For then those petitioners have been convicted without proof of an essential element of the offense. In other words, if something more than mere presence is required, then the government's case against Steinberg and Kremen on the accessoryship count and its conspiracy counterpart must fall. On the other hand, if mere presence is enough to make out the accessoryship offense, then no fact "not essential" to the harboring offense is present with respect to the accessoryship offense.

Thus petitioners Kremen and Coleman were placed in double jeopardy by their trial and conviction upon both the harboring and accessoryship offenses, and as to them, the judgments of conviction on Counts 1 and 2 must be set aside. Or, alternatively, petitioners Kremen and Steinberg were improperly convicted on the accessoryship counts since there was no proof of the additional element, whatever it may be, "essential" to that offense.

The multiple convictions of Kremen and Coleman on the harboring and accessoryship charges are contrary

[51]See *supra*, n. 7.

to the rule that federal criminal statutes are not to be construed as creating multiple offenses merely because they prohibited criminal act as multiple objects. Cf. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218; *Bell v. United States*, 349 U. S. 81; *Short v. United States*, 91 F. 2d 614, 620-624 (4 Cir.). Or, the convictions of Kremen and Steinberg on the accessoryship count, without proof of an "essential" element thereof, is a deprivation of their liberty without due process of law.

2. The conviction of petitioners Kremen and Coleman for participating in two conspiracies is invalid.

In addition to splitting up into two substantive offenses what was at most the single crime of harboring, the government also split what was at most a single conspiracy into two separate conspiracies. If there was any conspiracy shown by this record, it was a conspiracy to aid persons who were fugitives from Smith Act prosecutions. There was no evidence whatsoever to show any agreement to aid Steinberg separate and apart from an agreement to aid Thompson, or *vice versa*. The evidence which was relied upon to establish the existence of an agreement—and it was all circumstantial evidence, the agreement being inferred from the acts of the various petitioners—applied equally to both conspiracy counts and, as will be seen,[52] was admitted as bearing upon both without any distinction. The overt acts alleged to support each conspiracy are essentially the same (R. 4, 8), and consist, as has been seen, pri-

[52] *Infra*, p. 64.

marily of the joint occupancy of the cabin at the same time and place by petitioners and the fugitives.

In such a situation a single agreement may not be split up into multiple offenses merely because "it envisages the violation of several statutes rather than one." *Braverman v. United States,* 317 U. S. 49, 53; see, also, *Frohwerk v. United States,* 249 U. S. 204; *United States v. Rabinowitz,* 238 U. S. 78; *United States v. Cohen,* 197 F. 2d 26, 29 (3 Cir.); cf. *United States v. Adams,* 281 U. S. 202, 204.

3. The conviction of all petitioners on the conspiracy counts, in addition to their convictions on the substantive counts is invalid.

While Steinberg may not reap the benefit of the argument thus far made unless the Government disavows the theory upon which it procured the convictions of Kremen and Coleman on the accessoryship count,[53] it is clear that he as well as the other petitioners was subjected to double jeopardy by convictions on both the substantive and conspiracy counts. For the record shows that not only were the same acts required to be shown in connection with the two substantive offenses, but that these very same acts also laid the basis for the conviction on the conspiracy counts.

While it is true that one person alone may commit the crimes of accessoryship or harboring, and while it is true that a conspiracy normally involves the added element of an "agreement" among several persons, the fact of the matter is, and the record here reveals it to

[53] *Supra,* pp. 60-61.

be so, that when a multiplicity of defendants are involved in a harboring or accessoryship situation, they of necessity must act in concert. They cannot commit the substantive crime in any other way. In other words, if two or more persons, at the same time and place, harbor a fugitive or are accessories after the fact to a crime, they must act in concert. It is inconceivable that more than one person can commit these substantive offenses without there being at least an "implied" agreement.

Indeed, this must have been the unexpressed theory of the Government at the trial, since it is the only possible justification for its motion that "all the testimony and exhibits heretofore admitted as to certain defendants be admitted to all defendants" (R. 74; 901). This could have been the only theory on which the trial court granted that motion (R. 75). This blanket offer of evidence by the Government and its receipt by the trial court was not upon the usual theory that co-conspirators may bind each other, for the jury was never instructed that the evidence so received was to be limited to the conspiracy counts alone. And indeed, the conspirators were not alleged to have been identical in the two counts. Steinberg was named as a conspirator in the second but not in the fourth count, while Thompson was named as a conspirator in the fourth count but not in the second count (R. 4-6).

Since all of the evidence was admitted against all defendants on all counts, it is clear that no distinction was ever made by the Government in its handling of the evidence, by the trial court in its receipt of it, or by the

jury in its understanding of it, as between the substantive and the conspiracy counts. Thus, whatever may be the rule in other situations, the facts here as well as the legal theory upon which the case was tried, demonstrate that the substantive offenses were merged in the conspiracy. It has been held that in such a case, a conspiracy charge may not be added to the substantive offense. *United States v. Katz,* 271 U. S. 354, 355-356; *Gebardi v. United States,* 287 U. S. 112, 121-122; *Pinkerton v. United States,* 328 U. S. 640, 643.

The Government, the trial court, and the affirming judges permitted petitioners to be convicted and sentenced on a series of separate and disparate counts, although all of the evidence against all of them at best established but a single violation of the harboring statute. The judgments against them, particularly in view of the fact that consecutive sentences were imposed upon petitioners Coleman and Steinberg, and that the sentences imposed upon all petitioners (including Kremen) were in excess of that permitted under the harboring statute, cannot stand. *Dimenza v. Johnson,* 130 F. 2d 465 (9 Cir.); *Robinson v. United States,* 143 F. 2d 276 (10 Cir.); *Smith v. United States,* 211 F. 2d 957 (6 Cir.); *O'Neill v. United States,* 236 F. 2d 636 (6 Cir.).

(B) SECTION 3 WAS CONSTRUED AND APPLIED IN A MANNER CONTRARY TO THE COMMON LAW AND TO THE REQUIREMENTS OF THE FIFTH AND SIXTH AMENDMENTS.

In addition to the foregoing reasons why the accessory statute (18 U.S.C.A. 3) cannot be applied to these petitioners, whose sole offense, if one existed at all, was harboring, is the further reason that the accessory after the fact statute was never intended to apply to assistance rendered a fugitive three years after his conviction and thousands of miles away from the place where he had long since completed the commission of the principal offense.

The definition of an accessory after the fact contained in Section 3[54] "is based upon the authority of" *Skelly v. United States,* 76 F. 2d 483 (10 Cir.), cert. den. 295 U. S. 757 (Reviser's Note, 18 U.S.C.A. 3). The *Skelly* opinion in turn is based squarely upon the common law definition found in Blackstone and the early American state cases (76 F. 2d at 487).[55]

At common law an accessory to a crime was a *party* thereto, one who was connected directly therewith or "in some way concerned therein". Indeed, at common law the acts of the principal and the accessory constituted "one continuous transaction . . ., a single offense committed by them jointly . . ." for which the parties could be jointly tried in a single indictment. *Skelly v.*

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[54] "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment . . ."

[55] Even prior to the enactment of the statutory definition, the federal courts looked to the common law for the meaning of this term. *United States v. Chapman,* 3 F.Supp. 903 (S.D. Ala.).

United States, supra, at 487-488. Cf. also, *Nye & Nissen v. United States,* 336 U. S. 619; *United States v. Peoni,* 100 F. 2d 401 (2 Cir.); *United States v. Paglia,* 190 F. 2d 445 (2 Cir.). Absent this close relationship to the principal crime, there was no accessoryship at common law; an aider and abetter was not, as the accessory was, a *party* to the crime.[56]

It follows from the foregoing that, when, as here, the principal crime has been completed by the apprehension and conviction of the principal offender, there is neither a legal nor a logical possibility of anyone's then becoming an accessory after the fact to that crime. The principal crime having come to an end and no longer having a current existence, so to speak, one cannot become an accessory, that is, a party, to it. One may commit other offenses, but not the offense of accessoryship. One might conceivably become an accessory to a *new* crime which has as yet been undetected or concerning which the principal offender has as yet not been indicted, tried or convicted, but certainly once there has been a specific conviction, aid rendered thereafter cannot constitute accessoryship.

The indictment here alleged that Thompson had been "convicted" of an offense before petitioners rendered any assistance to him, and the proof (Exh. 121; R. 901) showed that the conviction had occurred three years before the aid was rendered. Thus the principal offense so far as Counts 1 and 2 are concerned was long since

[56]However, this does not mean that the aider and abetter was not ject to punishment (see *infra,* p. 68), but it was not as an accessory.

at an end. There was in 1953 no "continuous [criminal] transaction" with which petitioners could have been involved as accessories after the fact. If the indictment had alleged that Thompson had committed additional violations of the Smith Act, perhaps petitioners could have been charged with being accessories after the fact to those violations. And perhaps petitioners Kremen and Coleman could have been charged with being accessories after the fact to Steinberg's continuing violation of the Smith act, if such had been alleged.

None of the petitioners were so charged, however. The only accessory after the fact charge in this case had to do with Thompson's already completed offense. As to it, the record is clear that long before petitioners rendered any aid to Thompson, he had suffered a conviction therefor. At common law, aid rendered in such instances[57] does not constitute accessoryship.

There were, of course, other crimes which could be committed at common law by one aiding the principal offender. These crimes, while superficially resembling accessoryship, were analytically quite different. They involved giving aid (generally post-conviction) to the principal offender without, however, participating in the principal crime. Such offenses included misprision of felony, compounding felony, escape, prison breach, aid to fugitives, etc. 2 Hawkins P. C. § 29; 9 Halsbury's Laws of England (2d ed.) §§ 593-599. They did not, however, include accessoryship after the fact.

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[57]With the possible exception of jail break assistance. See *infra*, p. 69. Such assistance is not involved here.

The affirming opinion, asserting that petitioners are in "palpable error" on this point, quotes a portion of Bishop's Criminal Law (231 F.2d at 167; R. 964; App. 34), not recognizing, however, that the author at that place is specifically discussing only "rescue . . . from the lawful confinement . . ." (Bishop, Criminal Law [9 ed.], 500-501), and that, except for such jail break, not a single case of accessoryship has been reported at common law based upon acts of assistance rendered after the conviction of the principal.[58]

Nor does the presence of the word "punishment" in Section 3 alter the case. In the first place, the word itself is ambiguous: one may seek to elude punishment in advance of, as well as after, conviction. Since it is subject to at least these two constructions, the word, appearing as it does in a criminal statute, must receive the narrower interpretation here contended for by petitioners, and may not be enlarged to embrace what Congress might have said, but did not clearly say. *Pierce v.*

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[58]The sentences in *Bishop* immediately following the language quoted by Judge Lemmon are:

> "If a man is committed on a charge of a felony, though only awaiting his trial, *the rescuing of him, or helping him to break prison*, is a distinct felony, equally whether he is guilty or not; when the commitment is on a charge of a misdemeanor, it is, irrespective of the question of guilt, a misdemeanor. Still where the commitment is for a felony, *the rescuer* is also, or may be, an accessory after the fact in it; and as the crime of the accessory is itself a felony, it is immaterial with which form of felony he is charged." (Bishop, *Criminal Law*, 9th Ed., Sec. 697, pp. 500-501; italics added.)

The two cases cited in *Bishop* at this point, *Rex v. Burridge*, 3 P.Wms. 439, and *Commonwealth v. Miller*, 2 Ashm. 61, each involved aiding a prisoner to escape from custody. *Rex v. Greenacre*, 8 Car. & P. 35, cited by the government in its Brief in Opposition (p. 14) was a *nisi prius* charge given to a jury in 1837, long after the reception of the common law here.

United States, 314 U. S. 306; *United States v. Weitzel,* 246 U. S. 533; cf. *Lanzetta v. New Jersey,* 306 U. S. 451.

Secondly, the commonly accepted definition of the term at common law already included the word "punishment":

> "An accessory after the fact is one who knowing a felony to have been committed, harbors the felon or renders him any other assistance to elude punishment." (Bishop, *Criminal Law,* 9th Ed., Sec. 692.)

Since common law words must be read in a federal statute as they were at common law (*Williams v. United States,* 179 F. 2d 644 [5 Cir.]), and since as we have seen the crime of accessoryship at common law did not include post-conviction aid, despite the presence of the word "punishment" in the definition, such aid cannot constitute accessoryship under the statute.

The affirming opinion advances an alternative ground for its holding. It says that whatever the common law rule may have been, "Congress had the undoubted power to enlarge the definition of accessoryship after the fact" (231 F. 2d at 167; R. 964; App. 35). This argument, however, is equally untenable to support the affirmance of the judgments of conviction on the accessoryship count and, therefore, its conspiracy counterpart. There is no question but that Congress had the power to enlarge the common law definition of the offense. The question presented, however, is whether Congress exercised that power. That Congress did not enlarge the common law definition of accessoryship is indicated by the fact that it used substantially the same

words as are found in the common law definition.[59] This is buttressed by the further fact that the Revisers make specific reference to *Skelly v. United States,* 76 F. 2d 483 (10 Cir.), which is based exclusively upon the common law, as the "authority" for the statutory definition. The "authoritative"[60] Revisers' notes demonstrate that Congress did not intend to enlarge the common law definition.

On the contrary, the legislative history of the 1948 codification of the criminal code shows that no enlargement of the common law definition was intended. That history clearly shows that Congress intended only to codify, and not to modify or enlarge, the then existing criminal law of the United States. Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess.; H. R. Rep. 304, 80th Cong., 1st Sess.; Sen. Rep. 1620, 80th Cong., 2d Sess.; 93 Cong. R. 5181-82; 94 Cong. R. 7928, 8906. Certainly an intention to enlarge the common law definition of accessoryship would have excited some comment during the course of the "impressive legislative history" of the codification. Cf. *Ex parte Collett,* 337 U. S. 55, 65-72.

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[59]The only jurisdiction we know of which specifically includes post-conviction aid in the definition of accessoryship after the fact is Texas where this result is obtained by virtue of a statute (Texas Penal Code, Art. 86) specifically defining an accessory after the fact as one who aids another in order, *inter alia*, to evade "*execution of his sentence*". See *Dent v. State,* 43 Tex. Cr. 123, 65 S.W. 2d 627, where at 65 S.W. 2d 636, it is made clear that this statutory language constitutes a *modification* of the common law concept that the "accessory was connected with the principal offender *before the* principal's conviction" and that this priority in time "*was necessarily* so . . ." in order to make out the offense at common law.

[60]*United States v. National City Lines,* 337 U.S. 78, 81.

The suggestion that petitioners' argument will result in a "strange frustration of the clear statutory purpose to deter aid and comfort to known offenders" (Br. in Opp. 13) is not tenable, since an analysis of the statutory scheme shows that Congress has itself carefully distinguished between aid rendered before and aid rendered after conviction, and has treated the two types differently in important respects.

Thus, while the offense of accessoryship is found in Chapter 1 of Title 18 (General Provisions), offenses dealing with post-conviction aid are treated in other portions of the Code. For example, in Chapter 35 (Sections 751, *et seq.*), Congress has made specific provision for punishing crimes of "escape and rescue", and in Chapter 49 (Sections 1071, *et seq.*), specific provision is made for dealing with "fugitives from justice". While this organization of the Code may not be controlling, it must not be overlooked in seeking to ascertain how Congress thought it was classifying the crimes with which it dealt. Clearly its separate treatment of crimes dealing with post-conviction aid indicates that its purposes will not be "frustrated" if this Court deals likewise with such crimes and limits them, by excluding from their scope (as Congress did), accessoryship after the fact.

Nor is there any danger that those who render "aid and comfort" to known offenders will go unpunished. It is manifest from an examination of 18 U.S.C.A. 751, *et seq.*, and 18 U.S.C.A. 1071, *et seq.*, that Congress made adequate provision for the punishment of those who render after-conviction aid to the principal offender (including those who aid him in avoiding "punish-

ment"), and that the Criminal Code does not leave the nation powerless in the face of such crimes. There is therefore no necessity to expand beyond its traditional boundaries, the common law offense of accessoryship so as to make it embrace post-conviction aid.

(C) THE STATUTES WERE IMPROPERLY APPLIED TO PETITIONERS IN THE ABSENCE OF ANY PROOF OF SCIENTER.

1. The harboring counts.

The government does not deny that in order to convict petitioners Kremen and Coleman of harboring Steinberg, it was necessary for the government to prove (1) specific "notice and knowledge" on the part of each of them that a federal warrant had been issued for Steinberg's arrest, and (2) that the acts of concealment were for the specific purpose of preventing that arrest (Cf. R. 849-850); and *Fulbright v. United States,* 91 F. 2d 210 (8 Cir.), makes it clear that these two elements are essential for a conviction of a violation of 18 U.S.C.A. 1071.

While the affirming opinion and the government's Brief in Opposition dwell at great length upon the evidence dealing with concealment and fictitious identity, neither of them anywhere points to any evidence which establishes either directly or inferentially that petitioners Kremen and Coleman had the specific knowledge required by the statute. There is in fact no such evidence and the government's proof, therefore, falls short of establishing, or even tending to establish, that these petitioners had the knowledge or intent requisite to a conviction for harboring fugitives.

As the Chief Judge pointed out in his dissent, there are many reasons why these petitioners may have hidden Steinberg[61] apart from any knowledge of the existence of a federal warrant or apart from any purpose to frustrate its execution (231 F. 2d 179-180; R. 986-987; App. 65-66).[62]

The government's suggestion (Br. in Opp. 14) that the "suspicious circumstances" under which petitioners were apprehended casts a burden upon petitioners to proffer an explanation of their activities, is an unwarranted attempt to shift the burden of proof from the government to petitioners, and if permitted to succeed will destroy any vestige of the presumption of innocence in this case. Certainly more is required to sustain a conviction than a showing of "suspicious circumstances"; certainly a defendant may not be convicted of a most serious felony because he chooses to rely upon the presumption of innocence and to remain silent when the government has produced nothing more tangible than "suspicious circumstances".

The reliance which the government placed upon the stolen property cases below is not well founded for, as the Chief Judge pointed out, a fugitive, unlike an in-

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[61] As a matter of fact, the evidence makes it rather more likely that Steinberg was concealing Coleman.

[62] The government, but not the affirming opinion, recognized that the burden of negativing possible alternative inferences rested on it. However, for the reasons specified in the dissenting opinion (231 F.2d 179; R. 987; App. 65), the government's attempt, below, to carry the burden (or shift it to petitioners) by the drawing of artificial analogies to cases involving stolen property, cannot be sustained. Nor can its efforts here (Br. in Opp. 15) to analogize the case to the "net worth" tax cases, meet with any more success.

animate and inarticulate piece of property, "could transport himself from place to place and could give [petitioners] any number of reasons why [they] should hide him" (231 F. 2d at 180; R. 987; App. 65-66). The basis for an inference which may be drawn from the unexplained possession of stolen property, does not exist in such a case as this. To apply any such irrational inference to the facts of this case would be to deny petitioners due process of law. *Tot v. United States,* 319 U. S. 463; cf. *Maggio v. Zeitz,* 333 U. S. 56, 66, 81.

Nor does the government's present reliance (Br. in Opp. 15) upon such tax cases as *Holland v. United States,* 348 U. S. 121, solve its problem. There, this Court held that once the government "has established its case", the defendant remains silent at his peril. The Court, however, was very careful to point out in great detail that the government had indeed established its case first, by "overwhelming . . . proof" of the amount of assets possessed at the commencement of the period in question (348 U. S at 135); second, by "proof of a likely source" from which the jury could have found the increases to have come (348 U. S. at 138); and third, by "evidence of a consistent pattern of underreporting large amounts of income" (348 U. S. at 139). Only because it had thus established its case, was the government entitled to a conviction. The Court was explicitly clear that, by its holding, it was not shifting the burden of proof to the defendant; on the contrary, it insisted that "the Government must still prove every element of the offense beyond a reasonable doubt . . ." (348 U. S. at 138).

The point in the case at bar is that, absent proof of *scienter*, the government had not established every element of its case and that the defendant therefore was not required to speak. And the suggestion that the "suspicious circumstances" were alone enough to establish a criminal case has not yet, so far as we know, ever been accepted by this Court.

2. The accessoryship counts.

With respect to the accessoryship counts, the situation is much the same.[63] Clearly, specific knowledge of the principal's offense and a specific intent to aid him, are essential to a conviction under Section 3. That section applies only to persons who, "knowing" that an offense has been committed, engage in the proscribed conduct. Absent such knowledge, there is no offense. If "general malevolence" is not enough to make out the offense of harboring (*Fulbright v. United States*, 91 F. 2d 210, 212 [8 Cir.]) it can hardly be deemed to be sufficient to sustain a conviction of the more serious accessoryship offense described in Section 3. Cf. *Skelly v. United States*, 76 F. 2d 483, 485 (10 Cir.); *Neal v. United States*, 102 F. 2d 643, 646 (8 Cir.).

The abortive efforts of the government to prove that petitioner Kremen had, many years earlier as a college student, been a "radical" (R. 836-852) or that one of the petitioners had subscribed to a presumably leftwing newspaper (R. 819-835), was based upon its recogni-

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[63] Of course, if the arguments made under either Subpoints (A) or (B), *supra*, are sustained, the conviction under the accessoryship count and its conspiracy counterpart cannot stand in any event.

tion of the necessity for establishing specific knowledge on the part of petitioners.[64] As the dissenting opinion points out, the government totally failed to establish that petitioner Kremen had the knowledge required to make out a case against her under the accessoryship counts. See 231 F. 2d at 181; R. 990; App. pp. 69-70. Petitioner Kremen presents this as a separate point on her own account.[65]

As to petitioners Coleman and Steinberg, evidence of their past associations with Thompson in the Communist Party was held to justify an inference that they "knew" of his Smith Act conviction. But such past associations are no adequate substitute for the specific knowledge required by the statute. To permit them to be so used conflicts directly with this Court's holdings in *Schneiderman v. United States,* 320 U. S. 118; *Weiman v. Updegraf,* 344 U. S. 183; and *Slochower v. Board of Higher Education,* 350 U. S. 511, to the effect that "association" is not evidence of guilt, intent or *scienter.* What the statute requires is specific knowledge of a spe-

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[64]We do not concede that even if the proffered testimony had been admitted it would have established the requisite knowledge. The significant point is that the government conceded that it was "absolutely necessary" for it to establish such knowledge before it could make out a case (R. 849-850).

[65]She also presents as a separate point on her own account the government's failure of proof with respect to her on the harboring counts as well.

Indeed, each petitioner stands before this Court as to each count on which he or she was convicted as a separate individual. None of them may be convicted upon evidence adduced against the other. This Court has held that the identity of defendants is not lost even in a charge of conspiracy. *Stack v. Boyle,* 342 U.S. 1, 9.

cific conviction, and this may not be inferred merely from past associations in an entirely different context.

Here, too, the "suspicious circumstances" relied upon, the inferences which the government seeks to draw from them, and the inference it seeks to draw from the fact that many years earlier these petitioners had been "long time cohorts" of Thompson in the Communist Party in New York, do not, as the Government believes (Br. in Opp. 14-15) point to guilty knowledge on the part of petitioners as the "only rational explanation" for their conduct. Other explanations, including those suggested in the dissenting opinion, are quite possible; and that being so, the Government had the burden of negativing them, or of at least proving that its thesis was more "likely" than any other (Cf. *Holland v. United States,* 348 U. S. 121, 138). Its failure to do so resulted in the conviction of petitioners without proof of the element of knowledge conceded on the trial to be "absolutely necessary" to make out a case.

III.

THE CONVICTION OF PETITIONERS ON COUNTS 1 AND 2 OF THE INDICTMENT CANNOT BE SUSTAINED BECAUSE (A) THESE COUNTS DID NOT ALLEGE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES; (B) THERE WAS A FATAL VARIANCE BETWEEN THE PLEADING OF THOMPSON'S CONVICTION AND THE PROOF THEREOF; AND (C) THE CHARGE WITH RESPECT TO THOMPSON'S CONVICTION WAS ERRONEOUS.

(A) COUNTS 1 AND 2 DID NOT ALLEGE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES.

Count 1 of the indictment charged that Thompson had been convicted of "conspiracy to (1) organize a society for the overthrow and destruction of the Government . . ." (R. 3) in violation, it was alleged, of Sections 2, 3 and 5 of the Smith Act and that petitioners were accessories after the fact to that crime. Sections 2, 3 and 5 of the Smith Act relate, however, not to societies organized for the overthrow of government, but rather to societies which "teach, advocate and encourage" certain proscribed doctrines.[66] Count 2 alleges a conspiracy to commit the crime described in Count 1. The omission of the words "teach, advocate and encourage" makes the indictment fatally defective, or at least so confusing as to render it insufficient to support a conviction.

An indictment must inform the accused of the nature and cause of the accusation against him, it must set forth the offense with clarity and certainty, and it must allege every ingredient of the offense accurately and clearly. *United States v. Cruikshank,* 92 U. S. 542. An

[66]The quoted language has been retained in the 1948 codification. 18 U.S.C.A. 2385.

indictment which charges an accused with being an accessory after the fact to one crime (conspiracy to organize a society "for the overthrow and destruction of government") and then five lines later alleges accessoryship after the fact to a violation of a statute creating an entirely different crime (conspiracy to "teach, advocate and encourage" illegal doctrines) cannot be said to meet the constitutional test.

It cannot be determined from the indictment whether the charge laid was accessoryship after the fact to a conspiracy to organize a society for the overthrow of government, or accessoryship after the fact to a conspiracy to organize a society to teach that doctrine. Since an accessory is a party to the principal crime, the same precision in pleading is required in accessoryship cases as in cases involving the principal crime itself. Certainly an indictment against Thompson charging the crime of "organizing to overthrow" in violation of Sections 2, 3 and 5 of the Smith Act would be fatally defective for inconsistency and lack of clarity; so too such an indictment against his alleged accessories must be equally bad.

This indictment did not advise petitioners with which of these two quite disparate offenses they were being charged. Nor is it clear from the indictment to what extent petitioners may plead their convictions here as a bar to future prosecutions for either or both of these offenses. Indeed, when petitioner Steinberg pleaded his conviction here in bar of an indictment charging him with a conspiracy to teach and advocate forcible overthrow and to organize the Communist Party so to teach

and advocate, his plea was overruled, despite the fact that he obviously could not be both a principal and an accessory to the same offense. *United States v. Stein*, 140 F. Supp. 761, 767 (S. D. N. Y.).

The affirming opinion called the foregoing defect in the indictment only "an artificiality in pleading" which it would not permit to be "tortured" into reversible error (231 F. 2d at 173; R. 975; App. 50). The government calls the language employed in the indictment merely a "compressed paraphrase" of the language used by Chief Justice Vinson in describing the conclusions of the Court of Appeals in the *Dennis* case (Br. in Opp. 16-17). We submit, however, that the Fifth Amendment's requirements that criminal pleadings be certain and precise, may not be so easily avoided. For the indictment to measure up to constitutional standards, it was necessary that it be cast in something a little more precise than a compressed paraphrase and that it avoid an inartificiality in language which led to a self-contradictory result.

The failure of the indictment to describe adequately the crime of which Thompson had been convicted was directed to the attention of the government and the trial court at the outset by the petitioners' Motion to Dismiss.[67] The government had ample opportunity to

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[67] Among the grounds specified in the Motion to Dismiss were:

"1. The first count of the indictment does not state facts sufficient to constitute an offense against the United States in that, among other things:

(a) It fails to allege that Robert G. Thompson was convicted of an offense against the United States . . .

2. The first count of the indictment is so vague and indefinite and so lacking in essential facts as to fail to advise the defend-

correct its error below and may not now complain if petitioners insist upon the point.

(B) THERE WAS A FATAL VARIANCE BETWEEN THE PLEADING OF THOMPSON'S CONVICTION AND THE PROOF THEREOF.

It is clear that if the first count of the indictment pleaded any offense, it was accessoryship to the crime of conspiring to organize a society for the overthrow of government. This was the crime pleaded specifically and in so many words. The conclusionary reference to Sections 2, 3 and 5 of the Smith Act is not controlling. Cf. *United States v. Hutcheson,* 312 U. S. 219; *Hammer v. United States,* 271 U. S. 620; *Pettway v. United States,* 216 F. 2d 106 (6 Cir.); *Holland v. United States,* 209 F. 2d 516 (10 Cir.); *Rose v. United States,* 149 F. 2d 755 (9 Cir.).

Yet, contrary to this specific charge, the proof established, in conformity with the actual fact (*Dennis v. United States,* 341 U.S. 494), that Thompson had been convicted of conspiring to organize a society to "teach and advocate" the proscribed doctrine (Ex. 121; R. 901).

The government's contention that this variance between its pleading and its proof was only "moderate"

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ants and each of them of the nature and cause of the accusation against them and each of them in each and every of the particulars set forth above.

3. The first count of the indictment is materially at variance with the statute upon which it is purportedly based (Title 18 U.S.C. 3) in that the said count fails to allege that Robert G. Thompson had committed an offense against the United States." (R. 9-11).

These objections to the first count of the indictment were incorporated by reference in that portion of the Motion to Dismiss directed to the second count. (R. 11).

(R. 894) cannot be sustained. On the contrary, the difference between a conspiracy to organize a society to overthrow government, and a conspiracy to organize a society to teach that doctrine, is a substantial one. Every Smith Act case has emphasized the distinction between the two; the First Amendment does not permit of any confusion on the point. But one does not have to go to the Constitution to note the differences between the two; the two offenses are clearly separate and distinct and are so specified in the separate and distinct statutes creating them. Thus 18 U.S.C.A. 2384, deals with seditious conspiracies, while 18 U.S.C.A. 2385 deals with unlawful advocacy. They are clearly not the same crime.

The variance which was called to the trial court's attention at the time the record of conviction was offered in evidence (R. 894), requires a reversal of the convictions of all petitioners on the first two counts of the indictment for the reason that, by virtue of it, the evidence fails to sustain the charge made. The affirmance of the convictions under such circumstances therefore constituted a denial of due process to petitioners. *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196; Cf. *Neal v. United States,* 102 F.2d 643, 647 (8 Cir.) and *Guilbeau v. United States,* 287 F. 731 (5 Cir.).

(C) THE CHARGE WITH RESPECT TO THOMPSON'S CONVICTION WAS ERRONEOUS.

Despite this state of the record (an indictment charging that Thompson had been convicted of a conspiracy to organize a society for the overthrow of government

and proof establishing that he had been convicted of a conspiracy to organize a society to teach and advocate that doctrine), the trial judge charged the jury that "as a matter of law" Thompson had been convicted of "the said crime", or "the crime therein described".[68]

This charge, to which timely objection was made (R. 927-928), was doubly erroneous.

First, it never told the jury what "the crime therein described" was: whether it was conspiracy to organize for overthrow, as specifically alleged, or conspiracy to organize to teach and advocate, as alleged inferentially by the reference to Sections 2, 3 and 5 of the Smith Act. By referring only to the crime "therein described", the charge did not make it clear which of the two crimes charged in the indictment—the one specified in so many words or the one specified by reference to the sections of the Smith Act—was meant. Furthermore, it is impossible to tell from the charge whether the "said crime" refers to the crime or crimes charged in the indictment or to the crime proven by the record of conviction (Ex. 121; R. 896, 901). In either case, such an equivocal instruction requires a reversal of the judgment. *Bollenbach v. United States,* 326 U.S. 607.

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[68]The instruction in full reads as follows:

> "Now with reference to that first count of the indictment, let me say to you that you need not examine the facts or the record presented to determine whether or not Robert Thompson committed the crime *therein described*, because I now tell you and instruct you as a matter of law that the record shows that Thompson was convicted of *the said crime* in a United States court, and that judgment was pronounced against him and has become final. Consequently, Thompson did commit the crime of conspiring to teach the overthrow and destruction of the United States by force and violence." (R. 913-14, italics added.)

Second, the charge was plainly contrary to the record, which showed without contradiction that, while the indictment specifically charged the crime of conspiracy to overthrow, the proof established the conviction of the crime of conspiracy to teach. Thus the instruction that "the record shows" that Thompson was convicted of "the said crime" is incorrect. Indeed, the record affirmatively showed that Thompson was convicted of something quite different from the crime described in the indictment. It was therefore error not to permit the jury to examine the government's proof in order for it to determine whether the record of conviction did or did not prove the allegations of the indictment.

The government contends that since the petitioners could not contest the fact that Thompson had been convicted of violating the Smith Act (Br. in Opp. 17-18), there was no issue for the jury to decide. But this begs the question. The petitioners, by their motion to dismiss and by their pleas of not guilty, could and did contest the fact that Thompson had been convicted of the crime described in the indictment, a crime in connection with which they were charged as accessories after the fact. Furthermore, petitioners could and did and do contest the fact that the government proved what it alleged—that Thompson was convicted of conspiring to overthrow government and that they were his accessories in *that* endeavor. Clearly, therefore, there was an issue to go to the jury. Indeed, petitioners could well argue that as a matter of law the proof so clearly failed to establish the allegations of the indictment that they were entitled to a judgment of acquittal at the hands of

the trial court. But be that as it may, they were certainly entitled not to have a direction to the jury against them on this issue.

The affirming opinion seeks to meet this argument by saying only that the charge was given in "incomplete language", and by asserting that this fact may not be "magnified" into error (231 F.2d at 173; R. 975; App. 50). However, it is not the incompleteness of the language used by the trial judge which is the fatal defect on this phase of the case, but rather his categorical instruction that, so far as Thompson is concerned, the government had proved the crime which it charged in the indictment. The record was clearly to the contrary and it was error to give the instruction.[69]

CONCLUSION.

Apart from the defects in the indictment, the variance between it and the proof made, the inadequacy of the proof of petitioners' guilty knowledge, and the errors of the trial judge's charge, any one of which is enough to require a reversal of the convictions below, there are two major defects in the government's case.

First, it is clear that the prosecution took what was at best a single act of harboring and by charging in

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[69]Both the affirming opinion (231 F.2d 173; R. 975; App. 50) and the Brief in Opposition (p. 17) lay store by the fact that petitioners' counsel were well aware of the crime of which Thompson had been convicted. It is submitted, however, that knowledge of counsel is no substitute for the requirements (1) that the indictment clearly advise the defendant of the elements of the offense, (2) that the government proved what it charges, and (3) that the trial judge instruct the jury correctly.

addition to the harboring, the offense of accessoryship to a crime long since ended and adding on top of that two conspiracy counts as well, unconstitutionally extended the punishment which was meted out. Whether the "book was thrown" at petitioners because they were Communists or involved with Communists is beside the point. The point is that for the simple misdemeanor of harboring, which carried with it a maximum jail term of six months, petitioners have as a result of the Government's legal juggling, been ordered imprisoned for much greater periods of time.

Second, because they were regarded by the court below as Communist enemies of the United States, petitioners' convictions were affirmed, despite the fact that their arrests resulted from a lawless "raid" and an illegal trespass by agents of the federal government. Their convictions were affirmed below despite the fact that the evidence used against them at the trial was obtained as a result of lawless searches and seizures by these same agents. This conduct smacks of the police state and cannot be squared with the requirements of our Constitution.

This Court said just recently in another case where the "waters of justice" were found to have been "polluted" by the government's use, albeit unwittingly, of what even the dissent referred to as "tainted testimony":

> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them." (*Mesarosh v. United States*, 352 U.S. .....)

No more, we submit, can it afford to abide with a conviction based upon illegally obtained evidence.

For the foregoing reasons the judgment of the court below should be reversed and the cause remanded to the District Court with directions to enter an order granting the motions for judgments of acquittal made on behalf of each of the petitioners.

Dated, San Francisco, California,
November, 1956.

Respectfully submitted,
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Counsel for Petitioners.

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Of Counsel.

(Appendix Follows.)

Appendix

EXHIBIT A

PERSONAL PROPERTY AND PAPERS

1	Sleeping bag with tan air mattress
1	Sleeping bag case, Kelly's of Oakland
2	Brown canvas cover, Spiro's of San Francisco
1	Skysleeper Kit bag
1	Tan zipper shaving kit containing:
1	Hair brush
1	Tooth brush
1	Bar soap wrapped, Ivory, hotel size bearing name Hotel Regis, corner 11th & K Streets, Sacramento, California
1	Shoelace
2	Packages pipe cleaner
1	Pencil flashlight battery
4	Razor blades
1	Package lighter flints—Ronson
1	Spool fishing leader material
1	Bar soap, hotel size, wrapped, with "Pearl" on one side and "Hotel Regis" on other
1	Paid covered small size bag with zipper for pillow
1	Pillow, cotton filled, small, white. No identifying marks
1	Tin drinking cup with initial "W" cut in bottom
1	Bottle 2 ounces Carters Blue Black Ink
1	Small box "Swingline Tot Staples," with "150" written on cover
1	Prince Albert tobacco—pocket size can
1	Key—on ring—Master Lock Co., Milwaukee
1	Calendar—Shell Oil Co., Billfold size
1	Digest of Angling Regulations for State of California—1953
1	Pair Turtoise Shell (dark brown) rimmed glasses with broken left lens
1	Plastic yellow folding type tobacco pouch with some tobacco and pipe cleaners
1	Man's metal expansion band 1/2012K gold top—Stainless steel back
1	Pencil sharpener—plastic—Vest pocket size
1	Polychrome duplicating ink—pound size

1	Padlock—"Master 77"—#5926
1	Carters Rubber Cement
1	Friction tape—1 roll—slipknot
1	Rubber top—partially used
1	Pair socks—men's—grey—dirty
1	Ink—Parkers Superchrome
1	Ink eraser—partially used bottle
1	Key—"Ilco" #1054K—by Independent Lock Co., Fitchburg, Massachusetts
1	Handkerchief—dirty
1	Pamphlet of "Tour"—California Hotels
2	Bottles Solution of Hydrogen Peroxide by McKesson's, N.Y. (1 small)
1	Roll cotton
1 pr.	Sunglasses and leather case
1	Can Briggs pipe tobacco
1	Ronson cigarette lighter & cigarette case combination (empty)
1	Tin Prince Albert Pipe Tobacco
1	Tin can containing change
1	Jar scalp pomade, dark, by Oglevie Sisters, N.Y.
1	Pocket knife, red, Victoria Switzerland Armee Suisse
1	Bottle Richard Hudnut Formula A-10 for men for hair and scalp treatment
2	Cans bandaids
1	Bottle Jergen's Lotion
1	Box—empty, marked Craftsman 25
2 pr.	Glasses, 1 light and 1 dark frames
1	Tobacco pouch, red plaid
1	Sponge, blue
2	Bottles Alka-Seltzer
2	Tubes toothpaste, Chlorodent (1 small & 1 large size)
1	Bottle Pepto Bismol, marked 98
1	Can Sopronol for athletes foot
1	Can Rise Shave Cream marked "59" on side
1	Craftsman 25 Electric Shaver and cord in red plaid zipper bag
12	Glass tubes with stoppers "List No. 2032 Procaine Hydrochloride 4% Epinephrine 1:50,000 Abbott Laboratories Lot 6243575" with "Cook Waite" on end of stopper

1 Mirror, two sides, for shaving
1 Sunbeam Electric Shaver & plastic case with cord
1 Jar
1 Bottle Williams After Shave Lotion
1 Toothbrush
1 Debutante Hand Cream
1 Bottle Squibb Mineral Oil
1 Bottle Pacquins Hand Lotion
1 Bottle brown pills—unmarked
1 Small bottle Neohelramine Hydrochloride
1 Bottle Eljay Aspirin with black marks "BY" on label
1 Styptic pencil in plastic case marked with label "Handy-Spot Price 10¢"
1 Bottle McKesson's Boric Acid Crystals—4 ozs.
2 Packs Dill's pipe cleaners
1 Pack Kent cigarettes
1 Pack Kools—open & half empty
1 Pack Camel cigarettes
5 Pipes—smoking type
1 Tube Nupercainal Ointment—empty
1 Tube Barbasol Shave Cream—empty
1 Pack Gillette blue blades in dispenser
20 each razor
1 Gillette razor
1 Metal pipe cleaning instrument manufactured by Rogers and made in England
1 Bottle Mercurochrome
1 Jar Vaseline Jelly—white
1 Bottle 6.12 Insect Repellent
1 Bottle Calamine Lotion
1 Brush (wire)
1 Pencil "Winx" black with metal cap
1 Plastic cup, orange
1 Bottle Avon Shave Lotion
2 Razors, 1 Gillette—1 single edge, no name
1 Bar Palmolive soap
2 Eveready batteries for small flashlight
1 Roll fishing leader
1 Tube Boyle Zinc Oxide Ointment
1 Eveready battery size 915 AA
1 Box Bayer Aspirin
1 Tube Ipana Toothpaste

1 Tube Chloresiun Toothpaste
1 Fingernail clipper "La Cross"
1 Pack Blue Star Razor Blades
1 Brush, small, for shaver
1 Flashlight bulb 112
1 Plastic, brown zipper shaving kit
1 Sportsman's Guide with map
Maps by Edward W. Pulver & Son, copyrighters of Calif. Los Padres Nat'l. Forest
1 Book—Oregon Hunting Regulations 1952
marked in green ink "Peter Don's Sportsman Supply, Crescent Lake, Oregon"
1 Map of San Francisco by SF Chamber of Commerce
1 Map of Twain Harte locating cabin in ink
"1.6. Cabin" with route drawn in ink.
Paster on bottom card of James Morrow, Real Estate Broker, Twain Harte, Calif.
1 Map Summit District, Stanislaus Nat'l. Forest
2 Plastic, brown glass cases marked on top "Polaroid"
1 Index to topographic mapping in Calif. with pencil marks on back
1 Map of Mendocino Nat'l. Forest
1 Map "Chevron Co." of Nevada
1 Map of Burlingame and San Mateo, marked Hotel St. Matthew
1 Index to towns, mountains, meadows, misc., and Map of Stanislaus Nat'l. Forest and note in ink re: Vernon Swamp, Gravel Lakes, hiking distance, etc. and Topez Lake cut throat trout
1 Map of Stanislaus Nat'l. Forest, Calif.
1 Monkey wrench
1 Small bottle of Halazone
1 Can used saddle soap
1 Rod varnish—small bottle
1 Ferrule cement
1 Metal cap—"Egg lug"
1 Ever-Ready flashlight battery
1 Small can of bouillion cubes
14 Lead sinkers
1 Spinner
3 Bobbers
1 Pocket knife—3 blade
3 Split Shots containers (empty)

8 Face cloths
1 Fish hook on short wire line
2 Brown canvas quilted sleeping bag
1 Sleeping bag mattress—made by Wilber & Sons,
590 Howard Street, San Francisco
1 Cover for sleeping bag—Mfr.—Kelly's of Oakland, Calif.
1 Marclay play shirt—knit—green and yellow band
1 Yellow T shirt—man's typo
1 Gantner, size 32. blue—swim trunks
1 Blue T shirt
1 Blue and white striped pajama bottom
1 Blue—long sleeved jersey
1 Health Gard white sweat shirt. Size 38
1 Blue men's shorts, size 36
1 Wilson Bro. size 42, men's undershirt
1 Health Gard, size 34, long underwear
1 Acetate—Nylon—gray men's shorts
1 White muslin bag
1 Grewe' knitted sweater, V neck, maroon
2 White T shirts—Superior Brand—Medium size
1 White T shirt
1 Fruit of Loom blue men's shorts
1 Jambi—white T shirt—size 42-44
1 Ribbed T shirt—off white
1 Blue necktie—silver color feathers
1 Pair Navy blue knit gloves
4 Men's cotton handkerchiefs
1 Pair striped shorts
1 White cotton T shirt
1 Onesta T shirt—white
4 Neckties—miscellaneous colors
9 Pairs, men's socks
1 Brown knit sweater "John Wanamaker"
1 Overseas bag—Army type, olive drab, with 3 small hooks
on outside zipper—containing:
9 Handkerchiefs marked
1 Yellow T shirt "20" & "NL" (?)
1 Bathrobe—Hale's Men Store
1 Raincoat, plastic
3 Christmas cards all ident.:
"To Daddy from Carol"
"To Daddy from Carol"
"To Carl from Marge"

4	Keys on safety pin for locks on outside of bag
	2 ea. Slaymaker 62—for locks on outside of bag
	1 ea. Slaymaker 63—for locks on outside of bag
	1 very small—says "Made in USA"
2	Keys loose for locks on outside of bag
	1 Slaymaker 61
	1 Slaymaker 63
1	Pouch, brown
1	Toothbrush
1	Bottle Roux Rinse 105½ light auburn
1	Bottle Petroleum Jelly—Vi Jon
1	Toothbrush & case
1	Package pencil lead
1	Pocket & Desk stone
1½	Pipes
1	Brush—"Solid Black, USA"
1	Lipstick, Westmore
1	Female plug
1	Imitation leather small case
1	Battery—Flashlight, Eveready
1	Pencil—Loveliners brown
1	Can Esquire Boot polish—mahogany
1	Bottle Vaseline hair tonic
1	Tube Ipana toothpaste
1	Laundry paper wrap
1	Sweater—sleeveless
1	Scarf—plaid
1	Pair brown crepe soled leather loafers (John Ward—Men's Shoes)
1	Blue-gray woolen sweater, ½ sleeve with casting fisherman knit into garment. A "Barclay Playshirt"
1	Purple wool imitation lambskin wrap around short coat with long sleeves—attached to coat:
1	Wooden brown doe
1	Wooden faun
1	Pair knit green wool socks
1	Small ball, purple yarn
1	Roll white wrapping string
1	Roll #50 J & P Coats purple-gray thread
1	Army Air Forces glass case, brown, no contents
1	Pair gray knit socks, low
1	Sterling silver chain

1 Necklace with 3 turquoise pendants and Rhinestone backing
1 Brown leather belt on one pair of blue "Levi's" button fly
1 Pair blue "Levi's"—zipper fly (on side)
1 Pair white short soxs
1 Return postage envelope
1 Newspaper, page 16, at bottom of bag, Los Angeles Examiner, Sunday, December 16, 1951

Box of miscellaneous kitchen equipment as listed:

4 knives
5 Forks
1 Pancake turner
1 Can opener
2 Metal cups
2 Pots
1 Lid
3 Pie tins
1 Frying pan
1 Can Sterno
1 Can opener
1 Beer can opener
1 Large spoon
1 Clove garlic
1 Partially filled ½ lb. can of coffee
1 Partially filled 1 lb. can of coffee
2 Small bags of flour
1 Gal. can of gasoline or kerosene
1 Bottle insect repellent
1 Can pepper
1 Can paprika
2 Shakers of salt
1 Can Accent
1 Can sugar
1 Package bay leaves
1 Package of paper plates
1 Roll wax paper
1 Grater
1 Pot
1 Kitchen pan lid
1 Fire tong
2 Folders of Forty Finest Restaurants, San Francisco Bay Area
1 Miracle Miroil Fold Road Map, Eastern United States by Mobilgas

1	Issue of Everybody's Restaurant Guide
1	Khaki-colored drawstring bag containing:
1	Hair comb in case
1	Pair scissors
1	Safety razor
1	Partial tube Mentholatum
1	Plastic soap dish
1	Toothbrush
1	Bottle LePage glue
1	Box gauze
1	Partial box aspirin
1	Tie clip
1	Bottle Noxzema Skin Cream
1	Part bottle Stephan's Dandruff Remover
1	Partly filled bottle unidentified liquid—white in color
1	Robe—white, red, gray striped
1	Air mattress, rubber, olive drab
1	Mackinaw jacket, Malemute Brand
2	Nylon short-sleeve sport shirts, white and tan by MacMaster, size 15-15½
1	Topcoat—tan, soiled
1	Brown, man's overcoat
1	Short-sleeve sport shirt, terrycloth, faded blue with design on chest
1	Brown corduroy jacket
1	Blue single breasted man's jacket
1	Blue trousers
1	Green long-sleeved sport shirt, nylon, by Don Juan of California
1	Copy San Francisco "Chronicle," 8/17/53
1	Simplicity Fashion Preview
1	Magazine clipping re Steelhead fishing
7	Paper folders advertising "The New Harju Vertical Venetians" and all bearing statement "Manufactured by Harju Vertical Venetian Blind Co., 422 Douglas Avenue, Redwood City, California, call Emerson 8-4210"
1	Accordion type cardboard folder color guide of Flexalum Spring Tempered Slats with following stamped on front and back: "Harju Vertical Venetians, 422 Douglas Ave., Redwood City, California, Phone EM 8-4210"
1	Printed Craftsman Electric Shaver Guarantee, dated 6/26/53

12 White envelopes containing newspaper clippings of chess movements
43 Newspaper clippings of chess movements
1 Newspaper clipping captioned, "Drive Two hours—Then Rest"
1 Yellow plastic toothbrush in case
1 Cash register receipt, dated 4/10 for $1.88 to Palmer's Drug Store, Hayward, California
1 3 x 5 Spiral brown notebook with no writing
1 Blue Wool knit sweater, size 40, by "Wieboldt's"
2 Brown canvas sleeping bags, no identification marks, with zippers on 3 sides and 1 side being faded. Both are the same.
1 Thin mattress for sleeping bags having tag #GAL-2652 and manufactured by Wilber and Son, 590 Howard Street, San Francisco.
1 ½ plate
10 Budweiser beer cans
1 Old Taylor Whiskey bottle
1 Mustard jar
1 Army napsack—empty
1 Army-type sleeping bag cover, contractor, Seattle Quiet Mfg. Company, stamped "Quartermaster, Seattle General Depot."
1 Dish rag
1 Air pillow in case
1 Sleeping bag with red air mattress, all around zipper on bottom and side
1 Metal music stand
1 Mandolin with pick, "Nick Lucas"
1 Violin, bow and case, leather, cloth package containing resin by the A. B. Rosin, and flexible cover made in England, W. E. Hill and Sons, 140 New Bond St., W. Violin bow has name "Tourte". Violin says "Copy of Antonin Stradivarius, made in Germany"
1 Langley 8' 6" fly rod
1 True Temper bait casting rod
1 Sportsman Rod
1 Cal Royal spinning rod
1 Open bag charcoal briquettes
1 Green metal fishing tackle box called "Union Utility Chest" containing miscellaneous fishing tackle including hooks, lures, sinkers, etc.

1 Fishing bag, cloth net
1 Green garden trowell
1 Small Army napsack containing additional fishing tackle, including flies, reel, salmon eggs, and miscellaneous first aid equipment bandages, snake bite kit, etc.
2 Wood and wire coat hangers
1 Gallon can of gas
1 Brown fabric zipper handbag with following contents:
1 Razor set, Eversharp
1 Bottle aspirin
1 Fishing guide book
2 Decks playing cards
1 Pair scissors
1 Roll toilet paper
1 Hair comb
1 Cup
1 Plastic refrigerator bag
1 Camouflage parka (incomplete)
1 Green portable cooking stove
1 Hand axe
1 Short handle spade
1 Ocean City brown reel
1 Brown cloth zipper handbag containing:
1 Deck playing cards
1 Soap box
1 Sal King fly rod reel
1 Bache-Brown Spinster reel
1 Water bag
1 Shoulder pack bag with stenciled "Orlando J. Perrett, 35392439"
2 Fishing dip nets "Sport King"
1 Cardboard carton, label on end reading "Tameroff Imperial Vodka" containing:
1 Pair leather mocassins
1 Pair Army type high work shoes
1 Pair low white tennis shoes, size 8½
1 Pair brown leather half boots with buckles "Wearmaster"
1 Flashlight, Wing Star brand
1 Pine cone
1 Piece cotton clothesline
1 Minnow bucket containing:
1 Papermate pen

1	Ocean City reel
1	Damaged flashlight
1	Small stapler and staples
1	Midget stapler
1	Can Revelation tobacco
1	Spring paper clip
1	Partial package rubber bands
1	Mimeograph stylus
1	Plastic refrigerator bag
1	RCA portable radio, Model BX57
1	Sentinel portable radio with plastic case Model 316P, serial 29004
1	Pair black rubber overshoes
2	Windshield wiper blades
1	Metal screen
1	Duck, greasy empty tool bag
1	Brown tweed reversible type overcoat—safety pin in sleeve
1	Match folder
1	Pair brown cloth gloves—man's
1	Orlon-nylon black and white check sport shirt (Jello match folder in pocket)
1	Clipping—"San Jose Evening News," 8/26/53 (Inside Labor)
1	Oakland Tribune—8/26/53
1	San Jose News—8/26/53
1	Sacramento Bee—7/3/53
1	Cylinder Polychrome stencil duplicating ink—1 pound
1	Impress duplicating ink—½ pint can
2	Expanding envelope—School wallet with pasted ink label Trials—Calif. H.A.W. GR—(?)
30	Sheets unused stencil paper
1	Paper folder—initials N W
1	Paper folder—dark brown—notation #II
1	Broken package, approximately 450 blank Autograph Mimeo sheets
2	School wallets—brown—1 labeled ORE and 1 labeled MM&RM
1	Carton 8½ x 14 mimeo sheets from N. W. Paper Co., Cloquet, Minnesota, Carleton type
1	Broken carton (approximately 100 sheets) same as above
1	Pack matches—advertising Sniders Donuts
2	Packages unused polychrome stencil

1 Unopened box Roux oil shampoo tint with red marking 150
2 Bottles from Palm Pharmacy, 1730 Mission St., Santa Cruz —PH 7260, #1346 Dr. Koskela 8/17/53 Mrs. (cut off) prescriptions
1 Bottle Tincture of Merthiolate from Twain Harte Pharmacy, California
1 Pill box containing 2 small red pills and marked in ink on top: "Dienesteral .5 mg50-145 Mrs. Kaplan on red— 5 white"
1 Pillbox with numerous white pills on outside in ink: "Dunesteril 1 mg50-115 Mrs. Kaplan one today, increase one daily"
1 Bottle from Palm Pharmacy, 1730 Mission St., Santa Cruz, #1347; Dr. Koskela 8/17/53, Mrs. (cut off)"
1 Bottle Roux Oil Bleach "2 drab"
1 Bottle same shape & color but no label
1 White envelope with pencil writing on poker hands
2 Sanitary belts
1 Receipt, Krazen Auto Supply, 138 E. Santa Clara, San Jose, Total $1.44—dated June 13
1 Receipt, Pay Less Drug Store, Reg. #51—dated June 13, Total $2.38
1 Siskiyou County map, stamped distributed by Thomas Bros.
1 Blue wool sweater, size 40, long sleeve pullover, tag of Wieboldts in Evanston, Chicago and Oak Park
1 Leather men's belt, brown, with torn zipper compartment
1 Topographic map, California, Lodoga Quadrangle, 15 minute series
1 Index to maps of California by Geological Survey, Department of the Interior
1 Man's shirt, tan, long sleeve, button down flaps on both chest pockets, soiled, with tag in inside of neck marked "Game and Lake Sportswear, Expertly Tailored," and with the following laundry marks on inside of collar band: Q-5, HZ; 394B (the last character believed to be "B" is not clear and might be the number 1, 2, 3, or 4). Also two other laundry marks not discernible.
1 Blue long sleeve man's shirt, flap pockets on chest, tag inside back marked "Van Heusen, 16, 16½ (L), Vangas, completely washable," with following laundry marks inside collar: 3941 (maybe 63941—first digit somewhat smeared); 646855; 5——(faded)

1 Man's blue dress shirt with tan or gold stripe, bearing tag "Imperial trade-mark, Sanforized," with laundry marks in collar as follows: 05 W L60: Q5

1 Faded beige man's long sleeve sport shirt with label of "Marlboro, Jockey Club (1) Washable" with following laundry marks in collar: WL60; 394— (last digit either a "one" or an "A"); 05; 0-5; Q-5; 165; B918855

1 brown man's jacket, single breasted, with inside label "Witty Bros. Craft," has the following marks: Inside breast inner pocket is tag "Witty Brothers, New York, A84630; near shoulder attached to lining of right sleeve is stapled cleaning tag 90/93371; several inches below shoulder in inside of right sleeve, written on lining are numbers 14/5. Has pipe cleaner in breast pocket and loose tobacco

1 Light tan corduroy man's jacket with label "Howard Sport Apparel," tag in collar marked size 40; with following marks: inside left sleeve on lining are written words "New Man SA (probably 8A); inside right sleeve on lining is number "1460"; inside in breast pocket, inner edge of lining are numbers "1832" or "1532"

1 Man's single-breasted blue suit coat, no label, inner lining of right sleeve contains lettering "27/99692"

1 pr. Men's tan or beige trousers with brown leather belt, worn and mended; left pocket has laundry mark $\frac{1}{968}$

1 pr. Men's blue trousers with following marks: right pocket has laundry marks "4649" and "27/99269" and either "B-5" or "135"; also two circular marks (believed coin marks) about size of dime with marking in circle not discernible; inside waistband to right of zipper is the word "HERMES" stamped four times; rear right pocket has paper tag stapled to it with number "6503" thereon

1 pr. Man's tan trousers with tag sewn to rear left pocket marked "Test reg. U.S. Pat. Off. Best by Test Sanforized"; right pocket contained the following items:

1 heavy black pocket knife

1 black Ace pocket comb

1 small metallic case with compartment on ends containing clear objects of glass or plastic

1 small round pink box containing two small green objects

1 box marked "Para-curve B & S"

The above items have been removed from the trousers.

1 Coat hanger with name of Recco Cleaners, Ph. 1015 1045-11th St.
1 Hanger with markings, The Temple, BAyview 9211, 5041 Geary St., Cleaning and Dyeing
1 Hanger with markings, Virginia Cleaners & Dyers, 2109 Virginia Ct., Berkeley, Calif., phone Ashberry 1345
1 Hanger with markings, Hastings, San Francisco, Oakland
1 Hanger with markings, White House Dyeing & Cleaning Works, 174 - 14th St., San Francisco, Phone HEmlock 0476
1 "Schermer's Library of Musical Classics, Vol. 833, Pleyel Op. 48, Six "Little Duets for Violin and Piano;" stamped on front cover is "Lloyd A. Wollmer Co., Music, Burlingame, Calif."
1 Mobilgas Miracle Fold Road Map, Western United States
1 Registration holder removed from auto containing following item:
Automobile Insurance Service Card bearing name GILBERT BYRNES, 169 Inner Circle, Redwood City, Calif., policy #CA377690, agent, David D. Bohannon Organization, 859 San Mateo Drive, San Mateo, Calif.
1 Pair men's blue trousers with suspenders attached; have red stripes in weave; right pocket has laundry mark "H" card bears name of General Casualty Company of America, First National Insurance Company of America, General Insurance Company of America, nearest office at 206 Sansome St., San Francisco 4, California
1 Remington Noiseless typewriter, serial #X370531
1 Portable Royal typewriter, serial #0-431783
1 Mummy-type sleeping bag with U. S. stamped on outside of bag
1 pr. leather slippers—Cherokee
1 pr. Worn plastic scuffs
1 pr. brown leather gloves
1 Newspaper clipping, paper unknown, begins "The—1953 date article Morse will back Democrats in '54"
1 Richfield Oil Company of California map
1 Shell Oil Company map of San Francisco—Bay area.
1 Shell Oil Company directory map of Auto Courts, Hotels, Resorts and State Park Camp Sites in Northern California and Nevada
1 pkg. Dill's Best pipe cleaner
1 bag with writing paper and envelopes

1 Brown cloth zipper jacket, McGregor, size 42 with 1 small Howart single cell flashlight in pocket
1 Ted Trueblood's Fishing Handbook
1 Gray Adam hat, Executive Quality, size 7, men's
1 Tan all-weather man's hat, size 7⅜
1 Tan zipper jacket, McGregor, size 42 with cloth bag in one pocket marked "Airex"
1 Cloth sweatshirt, size 38-40 "Double Play"
1 Red and black plaid fishing rod cover
1 Terrycloth white and red short-sleeve sweater, size medium, Gantner
1 Short-sleeve shirt, "Harper," medium, white and brown check with Eversharp Ballpoint Pen clipped to pocket
1 Box unused carbon paper
1 Partial box of Eaton's Berkshire Typewriter Paper with miscellaneous envelopes
1 Chess set
1 Shermer's Library of Musical Classics, Vol. 848, Sevcik Op. 8, for violin
1 Shermer's Library of Musical Classics, Vol. 297, for two violins
1 Shermer's Library of Musical Classics, Vol. 230, for the violin
1 Book of violin music by Amsco Music Pub. House
1 Copy of Everybody's Favorite Album of Violin Pieces published by Amsco Music Pub. Co.
1 Copy of Everybody's Favorite Album of Violin Pieces, Series #6
1 Copy of Violino Principale
1 Spiral Warner's #4, Spiral Manuscript book
1 Nick Manoloff's Mandolin Method
6 Issues of "Chess Review" for months June, July, August, September, November, December, 1951
1 Copy Oregon Angling Regulations for 1952
1 Check board
1 Copy U. S. News, July 24, 1953
1 Copy of Hometown, The Rexall Magazine, August, 1953, bearing City of Santa Cruz, California, on back page
1 Thomas Bros. Map of the City and County of San Francisco and East Bay
1 Recipe box containing puppet
1 pr. Argyle socks

1 pr. Brown socks
1 pr. Blue socks
1 Cloth money belt—empty
1 Black ring notebook
1 Blue denim cap
1 pr. Wine-colored woolen gloves
1 Woolen stocking cap
1 pr. Munsingwear, size 36, long underwear
1 long-sleeve undershirt
1 pr. Gantner wikies, size 36, green shorts
1 pr. Blue Fruit of the Loom shorts
1 Jacket—tan color, Essley Functional Jacket
1 Blue cloth zipper satchel
1 pr. Brown men's shoes
5 Violin strings
1 pr. Hair clippers
1 Pocket knife
1 Scripto Ballpoint pen
1 Canvas men's hat
1 Plastic raincoat
1 pr. White shorts, size 34, Patent 2231299
1 Brown plaid shirt, Penney's Towncraft
2 Leather belts, 1 brown, one cordovan
1 Rust-colored tie with tag "Ward & Ward"
1 Blue-grey tie with tag, "Pilgrim"
1 Blue tie with tag, "Van Heusen, Van Trevor"—all silk
1 Tie with tag, "El Denver, Los Wigwam Weavers, Denver, Colo.
1 Rust tie without label
1 pr. Soiled gray flannel slacks
1 Canvas knapsack with stenciled "J. J. MILLER"
1 pr. Socks, cotton argyle
1 Handkerchief with green and brown border
1 Green handkerchief with white border
6 Soiled white handkerchiefs
1 White undershirt
1 White T-shirt
1 pr. Healthguard medium white jockey shorts—soiled
1 pr. Soiled gray slacks—men's
2 Mandolin picks
1 Envelope with "Mak-Ur-Own" celluloid index tabs

2 Maps of California—Chevron Map—points of interest and touring map
1 Richfield Street Guide, San Francisco Bay Area
1 Empty soiled white envelope
1 Nevada Map—Chevron
1 Richfield Street guide, Los Angeles
1 Map of San Jose and Santa Clara County
1 Blue or grey felt hat, man's, size 7⅛, sweatband bearing name of Dobbs Cross Country, Reg. U. S. Pat. Off. and *Brey's*, 1062 Wilson Ave., Chicago. Inside crown has marking of Dobbs Fifth Avenue, Cross Country. Attached to felt behind sweatband is tape marked "Reg. B82459 600" 5⅜ 7⅛ size (Oval to duplicate block)
1 Cream-colored Panama with wine-colored band, man's, size 7. Sweatband with markings Stylepark, New York, Philadelphia and 1516 Chestnut St., Philadelphia. Innerside of crown marked 27320 (6) 14 7; innerside of sweatband is labeled: color—tan coal, style EC89, price—$10.00, 7 size
1 Tan Panama hat, men's, wine hat band. Sweatband bears marking Macy's Men's Store, New York. Inside of sweatband is marking 7⅛ and price tag marked Macy's D 39 H 2.98. Inside of crown is stamped number 8 and "IK"
1 Assembled Transvision television set #615935
1 Brown cardboard box for "Print-O-Matic Rotary Stencil Duplicator which contained the following:
1 Model 4-A Print-O-Matic duplicator, serial #2670
1 Used stencil on the roller of the duplicator from which a copy was run off which is also in the box
1 Light yellow sport-type man's shirt, laundry mark D-5, L-40
1 Van Huesen 15-15½ Air Weave sport shirt, laundry mark D5W L60 D5 L40
1 Citadel man's gr. and white striped shirt, laundry mark D5—4H2
1 McGregar long sleeve, off-white, sport shirt, Medium Large, D5L. 22 41—18855 05 22
1 Ruggers BVD yellowish sport shirt, short sleeve, 8955 laundry mark
1 Brent sanforized grey and white striped man's short 15½-32, laundry mark: WL60-L60 . D5 . D5 05

1 Blue, long sleeve, sport shirt, laundry mark: D5 03441
1 Shirt—long sleeve—John Wanamaker—Wanatex Laundry Mark—039H 0-5 05 W WL60 L60—L60
1 Trousers—man's—herring bone, blue-gray, laundry mark on left pocket New Man SA, right pocket 27/9969 B5 1460 6247
1 Blue sport shirt—short sleeves, blue and white trim
1 Light blue denim jacket
1 Trousers—men's—solid blue, soft finish—appear to be home sewn
1 Green handkerchief
1 Papers from 1950 Chevrolet, exclusive of registration
1 Package of papers wrapped in tissue paper and found on dining room table
1 Brown cardboard box for "Sperry Pancake and Waffle Mix" containing papers and found on the floor of the bed in the bedroom above the living room side of the house
1 Unmarked brown cardboard box bearing the numbers "1952-43" on one end which contains papers and was found on the corner table in the bedroom above the living room side of the house
1 Brown cardboard box for "Rancho Soup" containing papers which was found at the foot of the bed in the bedroom above the living room side of the house
1 Brown cardboard box for "Burgermeister Beer" containing papers which was found on the floor of the hall closet at the head of the stairs on the second floor
1 Brown cardboard box for "First Call Dog Food" containing papers which was found on the floor at the foot of the bed in the bedroom above the living room side of the house.
1 Tan leather "Flex Bilt" expansion, single-handled brief case containing papers which was found on the bed in the bedroom above the living room side of the house
1 Brown leather suitcase with two hasps and one lock containing papers which was found in the closet of the bedroom above the living room side of the house
1 Tan leather suitcase with two hasps but no lock containing papers which was found on the bed in the bedroom above the living room side of the house

1	Brown split cowhide zipper briefcase without handles containing papers which was found on the dresser in the bedroom above the living room side of the house
	Papers, including wallet with papers for JOSHUA NEWBERG, found on and in desk located in living room
	Billfold and papers for ROBERT E. NEUMAN, or NEWMAN, found in a pair of tan gaberdine trousers on a chair in the living room
	Wallet with papers for WILLIAM GORDON and a brown leather money belt with money found in a pair of tan cotton pants on the straight-backed chair in the living room
	Miscellaneous papers for LEE KAPLAN and RICHARD KAPLAN found in a handbag in the possession of Defendant SHIRLEY KREMEN at the time of arrest. The handbag was returned to her
1	Wallet containing papers for JOHN F. BRENNAN found on the person of ROBERT THOMPSON

CASH AND CURRENCY

$28.63	From envelopes in the brown leather, "Flex Bilt" expansion briefcase
86.45	From envelopes in the brown leather, "Flex Bilt" expansion briefcase
993.75	From envelopes in the brown leather, "Flex Bilt" expansion briefcase
33.13	From the wallet with papers for William Gordon
520.00	From hidden money compartments in the leather belt on the trousers containing the wallet with papers for William Gordon
5.45	From the purse with papers for Lee and Richard Kaplan
236.28	From the wallet with papers for Robert E. Neuman or Newman
383.36	From the Wallet in the possession of Robert Thompson with papers for John Brennan

The following items were identified by Shirley Kremen as her personal property and returned to her on September 25, 1953:

1	RCA Victor Album—Symphonies 1 & 9, 3 records
1	Record Album—Capitol Records by Sibelius, "Symphony #1 E minor, Op. 39"
1	Remington record—"Bach Sonata"

1 Columbia record—"Chansons Parisiennes"
1 Parade record, Operatic library series—"Aida"
1 Remington record—"Schumann Sonata in D Minor, Op. 121"
1 Remington record—"Mendelssohn Violin Concerto"
1 Remington record—"Prelude to the Afternoon of a Fawn"
1 Remington record—"Paganini Violin Concerto in D Major"
1 Remington record—"Sonata for Violin & Piano, C Minor"
1 Columbia record—"Edith Piaf Encores"
1 Remington record—"Op. 13 in C Minor"
1 Remington record—"Concerto in D Major"
1 Columbia record—"Beethoven Concerto in D Major"
1 Mercury record—"Concerto for Violin & Orchestra"
1 Royale record—"Brahms Violin Concerto D Major"
1 2-Record album by Royale—"Choral OP. 125"
1 Album 5 ea RCA Victor—Symphony #7 in A, serial #18G11D
1 Album, 4 records, RCA Victor—"Tschaikowsky Concerto #1 in B Flat Minor"
1 Album, 2 records, RCA—"Grieg Concerto in A Minor"
1 Album, 5 records, RCA Victor—Beethoven "Archduke Trio"
1 Album, 2 records, RCA Victor—Classical Symphony
9 Towels—various colors, cotton bath and face size—no identifying marks
5 Wash cloths, small, various colors, no identifying marks.
1 Yellow bath towel made by "Cannon"
1 White muslin cloth (looks like dish towel)—no identifying marks
1 Muslin dish towel "Martex Dry-Me-Dry"—white, with red and brown stripes on sides
1 White torn, burned sheet, used for ironing—no identifying marks
1 Ping Pong net with 2 holders (no name)
1 White plastic sunglass holder—"Hinge Patents Pending"
1 Pins—package of DeLong sewing type
1 Leather case for glasses
1 Towel—face type—Cannon

1 Towel—white muslin
1 Plastic case of miscellaneous small items—razor, spools of thread, lipstick, paper clips, wire
1 Seiberling Hot Water bottle & rubber hose
2 Jars Avon Cleansing Cream, 3½ ozs. & 1¾ ozs.
1 Plastic box with hair curlers and 1 tweezers
1 Foto-Flex Camera, empty
1 Mirror with green frame 3" x 5" approx.
1 Bottle Pinwave Pincurl Permanent in box
1 Eyelash curler
1 Plastic container, red, Maybelline Mascara with brush
1 Fuller hair brush
1 Card of Clinton Hooks & Eyes & Loops
1 Soldering iron, electric—by Harmic Mfg. Co., Grove City, Pa., No. 86, 75 Watts; 115 Volts
1 Plastic shower cap—yellow
1 Box powder
1 Comb, white
1 Debutante Powder Shampoo
1 Bottle Avon Astringent
1 Bottle Breck Shampoo
1 Tube lipstick
1 Bottle NTZ Antihistamine Decongestant (to relieve nasal congestion)
1 Fuller brush
1 G.E. automatic toaster
1 Colombia 3 speed record player
1 Box of Meds—partially empty
1 Package of toilet tissue—4 rolls
1 Package napkins
1 Cotton flannel bed cover—grey
1 Hammer—Marion Tool Co.
8 Bath towels—various colors
1 Kleenex—full
1 Scot towels—paper
1 Crescent wrench
2 Sierra Pine soap
1 Box aspirin (4 aspirins)
5 Hand towels
7 Pillow cases
1 Bed sheet (small letter K sewed on; 2057 laundry mark)
3 Table cloths

1 Blanket—U.S. Navy—Med Department
1 Bed sheet—Initial K (laundry 2057 A81)
1 Bed sheet—unmarked
1 Dark blue—turtle neck—sweater, knit
1 Suitcase, black imitation leather
1 Package Nylmerate Jelly (used) with directions
1 Red and blue polka-dot bra, self-supporting
1 Pair (Bronco-ettes by Mallo-Maid of California) Woman's blue denim pedal pushers
1 Pair white tennis shoes, canvas tops, rubber soles
1 Size 6⅞ 100% wool red baseball cap made by Gortman Hat & Cap Co., Oakland, California
1 Spangled 5" x 6X evening bag with zipper
1 Roll of "Jumbo Ripple-Tie"—blue
1 Pair white net mits
1 Pair white nylon evening gloves
3 Yards, ½" elastic, yellow
1 Pair, nylon briefs
1 Pair saddle shoes, rubber soles. Top white with black saddles (female)
1 Large size red and white beanie hat with "LEE" sewed on front
1 Woman's green cotton waffle weave suit (Eisenhower type jacket)
1 Yellow blouse, woman's, Rhinestone buttons, ripple collar, ½ sleeves
1 Woman's—Mode O'Day—White deep V neck blouse, no sleeves; one catch, no buttons
1 "Donig" white lace type woman's blouse, no sleeves
1 Rhinestone necklace with fixed pendant
1 Pair Rhinestone earings, square, made by "Phyllis"
1 Pair star type Rhinestone earings made by "Nemo"
1 String of seed pearls with rubber band on end (damaged)
1 Gray covered jewelry box, "Phyllis Originals"
1 Pair yellow "Moc Lucks" socks
1 Red and white breakfast coat, wool, red buttons, red collar
1 Flannel bed sheet—gray
1 Damaged Parker fountain pen with silver colored metal cap and wine or brown colored plastic pen
1 Woman's green overcoat with gold lining; has paper cleaning tag stapled to bottom edge of lining with number "25/940"

1 Infant dress, size 6 mo. made in Philippines
1 Kerchief—black and gold
1 White short sleeve Bermuda knit sweater—woman's type
1 White short sleeve sweater—woman's
1 Sweater—yellow—short sleeve—woman's Orbacks—made in England
1 Sweater—lavender—short sleeve—woman's
1 Sweater—green—knit—short sleeve—woman's
1 White sweater—turtle neck V

Martin Knit Wear of California—woman's

1 Light blue—woman's briefs
3 White briefs—woman's
1 Bra—Silbra strapless
2 Bras, white
1 Pants—pink—woman's
1 Night gown, white—Dashing Deb
1 Bathing suit, woman's—yellow, blue, white
1 Night gown, size 38, Swank Shortie
1 Pair gloves—white cotton, blue cuffs

Pay Less Drug Store

1 Undergown—top half—woman's
1 Slip—white
1 Breakfast Coat, Truzette of California
1 Slip—black and white
1 Pair of pajamas—flannel, blue and white
1 Girdle—Slackies
1 Bra—Alloette
1 Garter belt—Olga, California
1 Swim suit, red and white plaid, Gantner of California
1 T-Shirt—yellow—short sleeve
1 Sweat shirt—gray cuffs
1 Pair white work gloves
1 Blouse—pink and white striped
1 Bra—pink
1 Scarf—woman's—multi-hued
1 Blouse—pink—Cara Mae
1 Blouse—jersey—pink—zipper
1 Play shirt—knit—green, dark center strip
1 Blouse—Blue and white striped
1 Pair shorts—woman's—light tan
1 Pair pedal pushers—light blue
1 Pair shorts—woman's—blue denim
1 Pair white bobby soxs

1½ Pair stocking protectors
1 Pair Paisley women's shorts
1 Pair shorts—blue denim, woman's, with belt

The following was returned to Attorney NORMAN LEONARD for the defendants January 26, 1954:

1. 1950, two-door deluxe Chevrolet, Motor #HAA786026, 1953 Calif. plates #7B86733, with right door window broken, with registration certificate and following material:

A. In Glove Compartment
4 2½ x 4½ memo book fillers
1 pr. colored driving goggles in case
1 spoon
1 6-inch crescent wrench
1 S-shaped screw driver
1 6-inch yellow handled screw driver
1 pr. cuticle scissors
1 lead sinker

B. On Front Seat
1 Plaid Indian-style blanket

C. On Back Seat
1 yellow and brown fiber and plastic seat cushion
1 blue and red fiber and plastic seat cushion
2 bow ties
1 tin cup
5 wire coat hangers
1 aluminum suitcase coat hanger

D. In Trunk
1 1950 Chevrolet yearbook
1 pamphlet entitled, "Goodhousekeeping in your car"
1 bumper jack
1 set tire chains in bag
1 pair individual tire lug chains
1 lug wrench
1 spare tire and rim

2. 1950 tudor Ford sedan, Motor #BORH156413, 1953 California license #3G1606, with temporary registration and the following material:

A. In truck
1 lug wrench—4 headed
2 lug wrenches—single headed
2 bumper jacks

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

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Subject Index

	Page
I. The search and seizure	1
A. The search and seizure questions are properly before this court for decision	1
B. The arrests of petitioners Kremen and Coleman were invalid	6
C. The searches and seizures were likewise invalid	7
II. The unconstitutional application of the statutes	12
A. The statutes were unconstitutionally pyramided	12
B. Section 3 of Title 18 was unconstitutionally applied here	15
C. The statutes were applied to petitioners' absent proof of guilty knowledge	17
III. The defective indictment and the variance between it and the proof	18
Conclusion	20

Table of Authorities Cited

Cases	Pages
Agnello v. United States, 269 U.S. 20	3, 5, 8, 9
Alabama Packing Co. v. United States, 167 F. 2d 179 (5 Cir., 1948)	19
Baltimore etc. R. R. Co. v. Grant, 98 U.S. 398	16
Barone v. United States, 205 F. 2d 909 (8 Cir., 1953)	20
Baxter v. United States, 188 F. 2d 119 (6 Cir., 1951)	8
Bollenbach v. United States, 326 U.S. 607	12
Boyd v. United States, 116 U.S. 616	3
Byars v. United States, 273 U.S. 28	7
Carney v. United States, 163 F. 2d 784 (9 Cir., 1947)	11
Cofer v. United States, 37 F. 2d 677 (5 Cir., 1930)	4
Davis v. United States, 328 U.S. 582	8
Di Re v. United States, 332 U.S. 581	9
Fulbright v. United States, 91 F. 2d 210 (8 Cir., 1937)	6, 7, 17
Goldstein v. United States, 316 U.S. 114	2
Go-Bart Importing Co. v. United States, 292 U.S. 344	9
Gouled v. United States, 255 U.S. 298	3, 5
Grau v. United States, 287 U.S. 124	3
Harris v. United States, 331 U.S. 145	9
Hobson v. United States, 226 F. 2d 890 (8 Cir., 1955)	4
Holland v. United States, 348 U.S. 121	17
Johnson v. United States, 333 U.S. 10	7
Kelley v. United States, 61 F. 2d 834 (8 Cir., 1932)	10
Kotteakos v. United States, 328 U.S. 750	12
Marron v. United States, 275 U.S. 192	9
Matthews v. Correa, 135 F. 2d 534 (2 Cir., 1943)	4
McDonald v. United States, 335 U.S. 451	9
Mesarosh v. United States, 352 U.S. 1	12
Neal v. United States, 102 F. 2d 643 (8 Cir., 1939)	19

Pages

Pinkerton v. United States, 328 U.S. 640 15

Quinn v. United States, 349 U.S. 155 3

Rayborn v. United States, 234 F. 2d 368 (6 Cir., 1956) 14
Reynolds v. United States, 238 F. 2d 460 (9 Cir., 1956) 18
Roberson v. United States, 165 F. 2d 752 (6 Cir., 1948) 11

Silverthorne Lumber Co. v. United States, 251 U.S. 385 2
Sutton v. United States, 157 F. 2d 661 (5 Cir., 1946) 19

Taylor v. United States, 286 U.S. 1 11

United States v. Dean, 50 F. 2d 905 (D., Mass., 1931) 5
United States v. Di Re, 332 U.S. 581 6
United States v. Hall, 198 F. 2d 726 (2 Cir., 1952) 14
United States v. Janitz, 6 F.R.D. 1 (D., N.J., 1946), appeal dismissed, 161 F. 2d 19 (3 Cir., 1947) 4
United States v. Jeffers, 342 U.S. 48 3
United States v. Kaplan, 89 F. 2d 869 (2 Cir., 1937) 10
United States v. Lafkowitz, 285 U.S. 452 9
United States v. Lindenfeld, 142 F. 2d 829 (4 Cir., 1944), cert. den. 323 U.S. 761 9
United States v. Rabinowitz, 339 U.S. 56 ..... 8, 9

Walker v. United States, 225 F. 2d 447 (5 Cir., 1955) 10, 11
Weeks v. United States, 232 U.S. 383 3

Constitutions

United States Constitution:
Fourth Amendment 3, 11
Fifth Amendment 3
Sixth Amendment 18

Statutes

Federal Communications Act (47 USCA 605) 3

18 USCA 3 12

18 USCA 751 16

Pages

18 USCA 752, as amended May 28, 1956, Chap. 331, 70 Stat. 216 16

18 USCA 1071, as amended August 20, 1954, Chap. 771, 68 Stat. 747 ..... 12, 16

18 USCA 3052, as amended in 1951 6

Rules

Federal Rules of Criminal Procedure, Rule 41(e) 2, 4, 5

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

I.

THE SEARCH AND SEIZURE.

A. The search and seizure questions are properly before this Court for decision.

In its brief on the merits (pp. 21-24) the government makes the claim (not asserted in its Brief in Opposition) that the search and seizure questions should not be reached because petitioners failed to make a showing of their "right" to have the seized

property suppressed and failed to comply with Rule 41(e), F. R. Crim. Pro. This contention is not valid.

1. This Court, unlike some of the lower federal Courts, has never held that one must have a "right" of ownership or even possession in order to challenge an unconstitutional search or seizure. The right of the people to be free from such searches and seizures cannot be made to turn upon questions of title or possession. It is a constitution of a free democracy, and not a conveyancer's deed, with which we are here concerned. This case involves not a question of private property rights, but rather the enforcement by the federal Courts of constitutional limitations imposed upon federal officers.

As Mr. Justice Murphy, dissenting for himself, Chief Justice Stone and Mr. Justice Frankfurter, said in *Goldstein v. United States*, 316 U.S. 114, 127, the lower federal cases, imposing a possessory interest qualification, cannot be squared with Mr. Justice Holmes' observation in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, that the "essence" of the amendment is that evidence illegally obtained "shall not be used before the Court . . . [or] . . . at all . . . [T]he knowledge gained by the government's own wrong cannot be used by it . . ."[1]

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[1]Mr. Justice Murphy observed that to allow the government to use evidence obtained in violation of the Fourth Amendment against parties "not victims of the unconstitutional search and seizure", is to allow the government to profit by its own wrong, and to reduce in large measure the protections afforded by the amendment. *Goldstein v. United States*, 316 U.S. 114, 127, n. 4.

The majority opinion in *Goldstein* is not controlling here since admittedly it did not concern itself with a search and seizure pro-

Not only is the government's attempt to restrict the protection of the amendment to those who "claim" the illegally seized property, contrary to the repeated admonitions of this Court that its "guaranties are to be liberally construed to prevent impairment of the protection extended" (*Grau v. United States*, 287 U.S. 124, 128; and see, *Boyd v. United States*, 116 U.S. 616; *Weeks v. United States*, 232 U.S. 383; *Gouled v. United States*, 255 U.S. 298; and cf. *Quinn v. United States*, 349 U.S. 155), and to its observation that "a quibbling distinction" will not be permitted "to overturn a principle which was designed to protect a fundamental right" (*United States v. Jeffers*, 342 U.S. 48, 52), but it would result in posing for the accused a Hobson's choice. On the one hand, he would be required to assert an "interest" in the property seized before he could move for its suppression; on the other, by so doing he might very well establish for the government an element—or sometimes the element—of the offense charged. The amendment which was insisted upon by the people as a condition of the ratification of the Constitution, could not have been intended to require this. One is not compelled to abandon the protection given by the Fifth Amendment in order to assert the guarantees of the Fourth. Cf. *Agnello v. United States*, 269 U.S. 20, 35. Nor has this Court ever suggested as much.

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hibited by the Fourth Amendment (316 U.S. at 120), and involved only the objection that messages intercepted allegedly in violation of the Federal Communications Act (47 USCA 605) were used "outside the court room and prior to the trial" and "induced" evidence which would otherwise have been admissible (*ibid.*, at 121).

Furthermore, the Federal Rules of Criminal Procedure on their face require a rejection of the position urged by the government. Those rules do not limit the motion to suppress to those who "own" or "possess" or even claim ownership or possession of illegally seized property; rather, they provide that the "person aggrieved" by the illegal and unconstitutional actions of the officers may move for the return or suppression of the property. F. R. Crim. Pro. 41(e). An illegal seizure taints the evidence thereby obtained, and the rule of suppression is "a restriction *upon the power of the court* to permit the introduction of such tainted evidence." *United States v. Janitz,* 6 F.R.D. 1 (D., N.J., 1946), appeal dismissed, 161 F.2d 19 (3 Cir., 1947).

In any case, the record here clearly reveals that petitioners were in "possession" of the premises at the time of the illegal search, and this alone is enough to give them "standing" to challenge the illegal seizure. *Cofer v. United States,* 37 F.2d 677 (5 Cir., 1930); *Hobson v. United States,* 226 F.2d 890 (8 Cir., 1955). Cf. *Matthews v. Correa,* 135 F.2d 534, 537 (2 Cir., 1943). Indeed, it was on the basis of this very "possession" that the government laid its "foundation" for the introduction into evidence of the exhibits here involved.[2] Thus the government is here seeking to maintain that petitioners had a sufficient "interest" in the premises or in the property seized to justify the use of the evidence against them, while at the same time

[2] "The Court: It was offered and admitted as a document found at this place." (R. 239; and see R. 217, 233, and especially 240, *et seq.*, and, thereafter, 256-267.)

it argues that they have no standing to move to suppress it if it was illegally obtained. This it may not do. *United States v. Dean*, 50 F.2d 905 (D., Mass., 1931).

2. The government's further argument that petitioners failed to comply with Rule 41(e) is equally untenable. That rule does not prevent a motion to suppress from being made during the trial. On the contrary, it expressly provides that the Court, in its discretion, may entertain the motion on the trial. This the Court here did, and at no time during the trial did the government object that the motions were untimely (see, *e.g.*, R. 204, 216, 217, 228). In view of this record, the government has no basis for now asking this Court (Br. 24, n. 15) to "assume" that the motions were denied because of an alleged failure to comply with the rule.

When it appeared on the trial that property seized in violation of the Fourth Amendment was being offered against petitioners, they were at once entitled to invoke the protection not only of that amendment but of the Fifth Amendment as well, even without any application for the return of the things seized. *Agnello v. United States*, 269 U.S. 20, 35. By vesting discretion in the trial Court to entertain the motion during the trial, Rule 41(e) avoids any conflict with the constitutional principles involved. Indeed, any other construction of the rule might well raise serious constitutional questions:

> "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." (*Gouled v. United States*, 255 U.S. 298, 313.)

In any event, the rule was complied with, the trial Court entertained the motions and denied them on the merits, the questions were considered by the Court of Appeals on the merits, and the issue is now squarely before this Court for decision.

B. The arrests of petitioners Kremen and Coleman were invalid.

Despite the government's assertion to the contrary (Br. 30), petitioners Kremen and Coleman have not overlooked the fact that the probable cause necessary to support an arrest does not demand the same strictness of proof as guilt upon a trial. These petitioners have never formulated the issue this way. What they have said is that their arrests were invalid because their mere presence with the fugitives (*which was all the information the officers had at the time the arrests were consummated*) did not give rise to probable cause, no matter how defined, that they either were harboring the fugitives or were accessories after the fact to Thompson's offense.

The government has never met this issue. It has never suggested that the mere presence of petitioners with the fugitives would justify a finding of probable cause for the arrests. The cases of *United States v. Di Re*, 332 U.S. 581, and *Fulbright v. United States*, 91 F.2d 210 (8 Cir., 1937), are clearly to the contrary.[3]

---

[3]Though it is true, as the government contends (Br. 26-27), that 18 USCA 3052 was amended in 1951 to eliminate the element of "likelihood of escape", the amendment in no wise reduced the quantum of knowledge required by the officers to establish the existence of probable cause. Indeed, the fact that Congress eliminated the former element while not touching the latter manifests an intention to leave unchanged the pre-existing law on the issue of probable cause.

All the government can rely upon by way of knowledge to establish probable cause prior to the arrest is the circumstance that petitioners were found in the company of the fugitives. Since this is not enough to establish probable cause, the arrests were invalid. The fact that none of the petitioners was observed engaging in any unlawful activities (Br. 28-29) or any conduct from which could be drawn an inference of the existence of "the specific knowledge required by the statute" (*Fulbright v. United States, supra,* at 212) further destroys the basis for a claim of probable cause for the arrests.[4]

If there was probable cause to arrest these petitioners, then there was probable cause to arrest anyone found at the cabin. If that is the law, then no warrant is, or would ever be, required for the arrest of any person found in the presence of a fugitive. We think this is not the law, and we think that this Court must therefore hold these arrests without warrant to have been illegal.

C. The searches and seizures were likewise invalid.

The government argues that the seizures were valid as an incident to a lawful arrest (Br. 31-34). However, since as we have seen, the arrests of petitioners Kremen and Coleman were invalid, that portion of the

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[4]Nothing which subsequently developed (the false identifications, fabrications in the rental of the premises, secret and "cryptic" communications, purchase of automobiles and mimeograph machine, etc.) was known to the agents at the time of the arrests and may not therefore be taken as "evidence" which could have given rise to probable cause. *Byars v. United States,* 273 U.S. 28; *Johnson v. United States,* 333 U.S. 10, 17.

argument falls unless the arrests of Thompson and Steinberg can sustain it. But concededly those persons were arrested *outside* the cabin, and this Court has never held that an arrest outside a dwelling place justifies a subsequent search within it. Cf. *Agnello v. United States,* 269 U.S. 20, 32. It must be remembered that we are here dealing with a warrantless search of a private dwelling and not with a search of a public place or of a business establishment. There is, therefore, a correspondingly heavier burden on the officers to justify an intrusion which on its face is precisely the evil the amendment sought to eradicate. Cf. *Davis v. United States,* 328 U.S. 582, 592-593; *United States v. Rabinowitz,* 339 U.S. 56, 64.[5]

Furthermore, it is specious to argue that the search was "incidental" to the arrests of Thompson and Steinberg. Thompson was arrested so that he might serve a sentence for a crime of which he had already been convicted (Ex. 121; R. 901; and see R. 98, 201). Steinberg was arrested pursuant to a warrant (Ex. 120; R. 900; and see R. 98, 201), charging a Smith Act violation some *two years* earlier. No search in the Sierra Nevada Mountains in 1953 could be justified as incidental to either of those arrests.

Even if, contrary to the foregoing, it could be taken as true that the arrests of Thompson and Steinberg outside the cabin authorized the search without war-

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[5]The government's failure to comment on *Baxter v. United States,* 188 F.2d 119 (6 Cir., 1951), discussed at pages 44-45 of our opening brief, demonstrates, we think, its inability to justify this search without warrant of a private dwelling subsequent to an arrest which took place outside of it.

rant within it, the search itself was unreasonable. The rummaging search through the cabin from the utility room to the kitchen, dinette, and living room, up the stairway to the closets and bedrooms, down again to the porch and out to the automobiles (R. 209-212), together with the mass seizure of every box, book and scrap of paper, all without warrant and for the purpose of securing evidence to be used—and which was used—against petitioners, cannot be squared either with the mandate of the Fourth Amendment or the decisions of this Court. *United States. v. Lefkowitz,* 285 U.S. 452; *Go-Bart Importing Co. v. United States,* 292 U.S. 344; cf. *Di Re v. United States,* 332 U.S. 581; *McDonald v. United States,* 335 U.S. 451.

Most of the cases relied upon by the government to justify this search (Br. 34-38) we have already discussed and distinguished at pages 49-52 of our opening brief.[6] As to *Harris v. United States,* 331 U.S. 145, that case, decided by a majority of but one vote,[7] presented the question of a search following an arrest *made within the house, pursuant to warrant,* and for *specific stolen objects* thought to have been used in effecting a forgery (331 U.S. at 148). Unlike the case at bar, *Harris* was "not a case in which law enforcement officials have invaded a private dwelling without authority and seized evidence of crime" (*ibid.* at 153).

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[6] *United States v. Rabinowitz,* 339 U.S. 56; *Agnello v. United States,* 269 U.S. 20; *Marron v. United States,* 275 U.S. 192; *United States v. Lindenfeld,* 142 F.2d 829 (4 Cir., 1944), cert. den. 323 U.S. 761.

[7] Justices Frankfurter, Murphy, Jackson and Rutledge filed eloquent and powerful dissents (331 U.S. at 155, 183, 195).

Nor was it a case where, as here, "officers have entered premises ostensibly for the purpose of making an arrest,[8] but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime" (*ibid.*)[9] The holding of the case, containing, as the dissenters constantly reiterated, serious implications to basic civil liberties,[10] should not be extended beyond the narrow and precise facts which were believed to have justified it. It should not be made the basis for a further dilution of the rights guaranteed by the Fourth Amendment.[11]

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[8]In the case at bar the arrests of Thompson and Steinberg were consummated outside the cabin.

[9]Other distinctions between the cases appear in the balance of the Court's opinion: that the officers acted in good faith for the purpose of discovering specified objects; that the objects sought as well as those discovered were properly subject to seizure; that there was no search for or seizure of "an individual's private papers"; that there was not involved a prosecution based upon the expression of political views (*ibid.*, 154-155).

[10]See, *e.g.*, 331 U.S. at 155. Also illuminating are the observations to be found in 331 U.S. at 159, 161, 164, 171-173, 183, 186, 194, and 196-198.

[11]*Kelley v. United States*, 61 F.2d 834 (8 Cir., 1932), is also relied upon by the government (Br. 37). That case, however, involved the search of a barn from which the officers not only apprehended a strong odor of whiskey but from which they saw one of the defendants run as they approached. The defendant left the door of the barn open and the officers observed vats, boilers, stills and alcohol cans (61 F.2d at. 845). The defendant was brought back to the scene and there arrested. No comparable facts exist here.

At least one subsequent decision (*United States v. Kaplan*, 89 F.2d 869, 870-871 [2 Cir., 1937], per Learned Hand, J.), has distinguished the *Kelley* holding; and one other has impliedly questioned its validity (*Walker v. United States*, 225 F.2d 447 [5 Cir., 1955], as to which compare the majority with the dissent, especially at page 456, n. 10 of the latter).

The balance of the argument (Br. 38-43) does not, we think, meet the contentions already advanced by us. Without repeating those contentions, we respectfully refer the Court to their statement in our opening brief, pages 26-52. It is only necessary to add that the protection of the Fourth Amendment, contrary to the government's view (Br. 43), extends to all buildings within the curtilage, whether they be garages (*Taylor v. United States*, 286 U.S. 1), barns (*Walker v. United States*, 225 F.2d 447 [5 Cir., 1955]), or smoke houses (*Roberson v. United States*, 165 F.2d 752 [6 Cir., 1948]).[12] It would be strange indeed if the protection guaranteed by the amendment could be circumvented by a narrow view of the buildings embraced within its coverage. In any case, the most extensive search here took place within the dwelling; the search of the outhouse has primary significance as demonstrating that even ten days after the arrests, the agents still by-passed constitutional procedures.

Similarly, the argument that the only "fruits of the search" were false identification documents and that other evidence came from other sources (Br. 40) overlooks the basic premise of the amendment. The unlawful search by he officers tainted the entire case. We are less concerned here with the technical aspects of rules of evidence than we are with enforeing that standard of conduct which the amendment imposes upon federal officers. Also involved, of course, is this

[12] *Carney v. United States*, 163 F.2d 784 (9 Cir., 1947), cited to the contrary, is not authority here since in that case the agents procured a search warrant prior to entering the premises (163 F.2d at 785).

Court's concern with the administration of justice in the federal courts, and the question of whether a conviction resulting from a search such as was undertaken here can be permitted to stand.[13]

II.

THE UNCONSTITUTIONAL APPLICATION OF THE STATUTES.

A. The statutes were unconstitutionally pyramided.

In addressing itself to petitioners' argument that "by the very facts of the case" all of the proof which established the harboring of Steinberg also made out the accessoryship after the fact to Thompson's offense, the government details the elements of the crimes specified in the two statutes and points out the differences between them (Br. 45-46). It does not, however, address itself to the *facts of this case* as revealed by the record, which show that as to these petitioners, those statutes were unconstitutionally applied.

Petitioners have never suggested that on their face 18 USCA 3 or 18 USCA 1071 are invalid. We have said that on the record here, and contrary to the very distinctions so carefully spelled out by the gov-

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[13]The attempt to segregate each item of evidence must fail, not only for the reason that the principles underlying the amendment will not permit such an approach to the case at bar, but also because on this record "all the evidence" was introduced against all petitioners (R. 74-75, 901).

The cumulative effect upon the jury of the mass of illegally seized evidence was obviously significant. An appellate court may not now sift through the "dead record" to see if enough untainted evidence can be found to justify the conviction. Cf. *Bollenbach v. United States*, 326 U.S. 607, 614-616; *Kotteakos v. United States*, 328 U.S. 750; *Mesarosh v. United States*, 352 U.S. 1.

ernment, the identical evidence which made out the offense under one statute also made out the offense under the other; we have also said that as to petitioner Kremen there was not a scintilla of additional proof offered vis-a-vis Thompson, than there was vis-a-vis Steinberg.[14] If, as the government apparently now urges additional evidence was required to convict petitioners of Counts I and II different from that required to convict them under Counts III and IV, then such proof, as to Kremen and Steinberg, was not offered. On the other hand, if the same proof can sustain the convictions on both sets of counts, then, and on this record, Kremen and Coleman were placed in double jeopardy. We do not see how the government can have it both ways on this issue.

What has just been said applies equally to the conspiracy counts. The government makes an elaborate argument that there were two separate conspiracies, which it claims became linked up just prior to the arrests (Br. 49-52). But this argument is inconsistent with the record made in this case. Thus the government says in its brief (p. 51), that the acts of renting and occupying the cabin were acts of the "Steinberg group", but in its indictment it charged these very acts as overt acts in furtherance of the "Thompson

[14]The government's suggestion that, since Kremen's sentence on the harboring count was concurrent with her sentence on the accessoryship count, this argument is not "helpful here" (Br. 44), overlooks the fact that there were differences in the length of sentence imposed, and that if she is successful in invalidating the convictions on the accessoryship charge and its conspiracy counterpart, she will be liable (if she is unsuccessful in the balance of her argument) to a sentence of six months rather than one year.

conspiracy" (R. 5). Similarly, the government in its brief (p. 50) refers to evidence of Coleman's travels with Thompson prior to their arrival in California as overt acts of the "Thompson conspiracy"; but, on its own motion, that very evidence was received by the trial Court as against all defendants in connection with "both" conspiracies without any qualification or limitation (R. 74-75, 901).

If there were in fact two separate conspiracies, it is strange that the overt acts in both of them would have been identical, and that the identical evidence would have been used by the government to establish each of them. If the position now urged by the government be correct, then it could very well have prosecuted petitioners for participating in *three* conspiracies: the "Steinberg conspiracy", the "Thompson conspiracy", and the newly formed (Br. 53) "Thompson-Steinberg conspiracy". However, the record shows that from the outset the government treated this all as one conspiracy, which the prosecutor in his opening statement characterized as "a Communist Party conspiracy to protect its leadership" (R. 153; and see R. 155, *et seq.*). The splitting of that single conspiracy into two, because two leaders rather than one were involved, is utterly unwarranted.[15]

Finally, it is to be observed that the addition of conspiracy counts to the substantive counts is, *on the*

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[15]Petitioners could hardly have been charged with eight separate conspiracies, if all four of the *Dennis* fugitives (see *United States v. Hall*, 198 F.2d 726, 730 [2 Cir., 1952]) and all four of the *Flynn* fugitives (see Br. 5) had been found at the cabin. Cf. *Rayborn v. United States*, 234 F.2d 368, 370 [6 Cir., 1956]).

facts of this case, unjustified. For two or more persons cannot harbor a third at the same time and place or act jointly as accessories after the fact, without there, of necessity, being an agreement between them to do so. If, as here, joint action is necessary in the execution of the substantive offenses, then conspiracy charges may not be added to those offenses. *Pinkerton v. United States,* 328 U.S. 640, 643. The fact that the substantive offenses here involved cannot be committed absent an agreement does not, as the government believes (Br. 55), emphasize the solid character of the evidence from which the jury could infer the existence of a conspiracy; what it does, is to show that when substantive offenses, such as these, are committed by a plurality of persons, a conspiracy count may not be added to the substantive offense. This is so because, since the substantive offense of necessity embraces the agreement, the addition of a conspiracy charge means the imposition of double punishment for a single offense.

B. Section 3 of Title 18 was unconstitutionally applied here.

Although it may be true that "punishment" in the legal sense can be imposed only after conviction (Br. 56), this does not meet petitioners' argument. For Section 3 on its face deals with those who assist the offender "*in order to* hinder or prevent his apprehension . . . or punishment". The question therefore is may one before trial assist an offender in order to hinder his punishment. We believe that this may be, and is frequently, done. In other words, it is possible *even before trial and conviction* to give assistance "in

order to" hinder punishment. That it is possible to do so after conviction as well is no answer to the argument that the phrase, having at least these two meanings, is ambiguous and, since it is found in a criminal statute, must be the more narrowly interpreted.

Furthermore, since it is possible to give aid in order to prevent punishment even prior to trial, the government's reading of the statute (that the punishment referred to contemplates only a post-conviction situation) is too strained. When Congress intended to deal with post-conviction situations, it used clear and unambiguous language. Thus, 18 USCA 1071 (as amended August 20, 1954, Chap. 771, 68 Stat. 747), uses the words "after conviction", and 18 USCA 752 (as amended May 28, 1956, Chap. 331, 70 Stat. 216), uses the words "conviction of any offense", as does 18 USCA 751. Its failure to do so in Section 3 is not without significance. *Baltimore etc. R. R. Co. v. Grant,* 98 U.S. 398, 403.

Whatever dispute there may be about the common law scope of accessoryship, the fact of the matter is that the use of the word "punishment" in a context which renders it at least ambiguous, taken together with the failure of Congress to specify whether assistance "in order to prevent . . . punishment" meant assistance rendered before or after conviction, makes the statute unconstitutionally vague as applied to petitioner herein.

C. The statutes were applied to petitioners absent proof of guilty knowledge.

In elaborating upon the separateness of the elements required to make out a case on each of the two substantive offenses, the government emphasizes that petitioners' knowledge of Thompson's conviction, and their knowledge of the existence of process for the arrest of Steinberg, were each essential elements of the respective offenses (Br. 45-46). Absent proof of such specific knowledge (*Fulbright v. United States*, 91 F. 2d 210, 212 [8 Cir., 1937]), there can be no conviction on either offense.

Yet in arguing the point now under consideration, the government, unable to point to any evidence establishing such knowledge, asks the Court to "suppose" that petitioners knew of Thompson's conviction (Br. 62). Suppositions or assumptions, however, are no substitute for proof, and the convictions under Counts I and II cannot be sustained upon any such basis. As to Counts III and IV, the government does not even suggest that the Court may "suppose" that petitioners Kremen or Coleman knew of the existence of process for Steinberg's arrest; thus it is clear that there is a total failure of proof on those counts.

Petitioners do not seek, as the government erroneously assumes (Br. 63) to distinguish *Holland v. United States*, 348 U.S. 121, on the ground that it is a "tax case". We thought we had made it clear (Opening Br. 75-76) that there, unlike here, the government had offered "overwhelming . . . proof" (348 U.S. at 135) of "every element of the offense . . . "(*ibid.*, at

138). Here, admittedly, knowledge of Thompson's conviction and of process for the arrest of Steinberg were essential elements of the offenses charged. The government has not proved such knowledge, and its assumptions, suppositions and suspicions will not avail it.[16]

III.

THE DEFECTIVE INDICTMENT AND THE VARIANCE BETWEEN IT AND THE PROOF.

The government concedes that the indictment "mistakenly" refers to Thompson's offense as a conspiracy to organize a society for the overthrow of government rather than one for the advocacy of that doctrine (Br. 64). But it argues that this defect, as well as the variance between the pleading and the proof which resulted therefrom, is "insubstantial". We do not believe that the Sixth Amendment's requirement that a defendant "be informed of the nature and cause of the accusation against him" may be thus summarily dismissed.

A defendant is to be apprised of the offense charged with sufficient clarity so that he can make a defense and so that he may plead jeopardy in the event of a

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[16] ". . . where the prosecution is unable to muster evidence sufficient to overcome the presumption [of innocence], there will be an acquittal, even though the defendant be actually guilty.

"This is a calculated risk which society is willing to take. It does so because it regards the acquittal of guilty persons less objectionable than the conviction of innocent persons." *Reynolds v. United States*, 238 F.2d 460, 463, (9 Cir., 1956).

subsequent indictment. No matter how "insubstantial" the error, if it deprives the accused of either of these two protections, his constitutional rights are invaded. If the indictment on its face does not clearly charge the crime, or if it charges two or more crimes so ambiguously that "no one can say with certainty" of which the accused has been convicted (*Sutton v. United States,* 157 F. 2d. 661, 665 [5 Cir., 1946]), it is constitutionally defective.[17] Here the indictment, for the reasons already specified (Opening Br. 79-81), fails to meet this test. Nor does the allegation that Thompson's conduct was in violation of specified sections of the Smith Act cure the defect. That allegation is not one of fact but is rather a legal conclusion of the pleader which "constitutes no part of the description of the offense" (*Sutton v. United States, supra,* at 664; see, also, *Alabama Packing Co. v. United States,* 167 F. 2d 179, 181 [5 Cir., 1948]).

Further, a variance between the pleading of one offense and the proof of another is not "trifling", as the government suggests (Br. 67); rather it is material and prejudicial. This indictment informed petitioners that the government would seek to prove that they were accessories to one crime and not that it would seek to prove that they were accessories to another, and quite different, crime. Cf. *Neal v. United States,* 102 F. 2d 643, 648 (8 Cir., 1939).

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[17] While a bill of particulars cannot cure a defect in an indictment, it may be of some help in assisting a defendant to prepare for trial. Here petitioners' motion for such a bill (R. 15) was denied (R. 72).

We cannot understand the government's observation (Br. 67, n. 43) that petitioners do not question the propriety of the removal from the jury of the question of Thompson's Smith Act conviction. We thought that we had questioned quite sharply the trial jud 's handling of this entire situation (Opening Br. -86). We insist that since the proof (Ex. 121; R. 896, 901) did not support the charge, it was error to tell the jury that it did.[18]

CONCLUSION.

As we said in our opening brief, these convictions cannot stand, not only because of the defects in the indictment, the proof and the charge, but because the government has taken a single act of harboring and has compounded it into accessoryship and conspiracy. Furthermore, in any case, the government has procured the convictions of these petitioners on the basis of evidence which was illegally seized in an unlawful raid upon their dwelling.

For the foregoing reasons the judgment of the Court below should be reversed and the cause remanded to the District Court with directions to enter

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[18]Furthermore, merely because a conviction is a matter of "official court record" (Br. 67, n. 43), the government is not exempted from proving that which it charges. It is at least questionable whether the judgment of conviction alone is sufficient to carry the burden. Cf. *Barone v. United States*, 205 F.2d 909, 914 (8 Cir., 1953). In the face of the objections made below (R. 893-896, 928), the exhibit should have been rejected and the jury instructed quite differently.

an order granting the motions for judgments of acquittal made on behalf of each of the petitioners.

Dated, San Francisco, California,
February 11, 1957.

Respectfully submitted,
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No. 169

In the Supreme Court of the United States

October Term, 1956

Sidney Kramer, Samuel Irving Coleman, and
Sidney Stillerman, Petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and constitutional provisions involved	2
Statement	2
Argument	9
Conclusion	18

CITATIONS

Cases:

Agnello v. *United States*, 269 U.S. 20	11
Berger v. *United States*, 295 U.S. 78	16
Brinegar v. *United States*, 338 U.S. 160	9
Carroll v. *United States*, 267 U.S. 132	10
Dennis v. *United States*, 341 U.S. 494	3, 17
Elmendorf v. *Commonwealth*, 188 S.W. 483	14
Fulbright v. *United States*, 91 F.2d 210	15
Glasser v. *United States*, 315 U.S. 60	14
Go-Bart v. *United States*, 282 U.S. 344	9
Hagney v. *United States*, 285 U.S. 427	17
Harris v. *United States*, 331 U.S. 145	12
Holland v. *United States*, 348 U.S. 121	14, 15
Kotteakos v. *United States*, 328 U.S. 750	13
Marron v. *United States*, 275 U.S. 192	11
McCoy v. *United States*, 169 F.2d 776, certiorari denied, 335 U.S. 898	17
Morrisette v. *United States*, 342 U.S. 246	14
Nassan v. *United States*, 126 F.2d 613	14
Pereira v. *United States*, 347 U.S. 1	12, 13
Pinkerton v. *United States*, 328 U.S. 640	13
Rex v. *Greenacre*, 8 Car. & P. 35	14
Smiley v. *United States*, 186 F.2d 903	16
United States v. *Bianco*, 189 F.2d 716	9
United States v. *Cohen*, 175 F.2d 82, certiorari denied, 323 U.S. 799	16
United States v. *Flynn*, 216 F.2d 354 (C.A. 2), certiorari denied, 348 U.S. 909	3
United States v. *Katz*, 271 U.S. 354	13

Cases—Continued

	Page
United States v. *Lindenfeld*, 142 F.2d 829, certiorari denied, 323 U.S. 671	11
United States v. *Rabinowitz*, 339 U.S. 56	9, 10, 11, 12
United States v. *Rosenberg*, 195 F.2d 583, certiorari denied, 344 U.S. 838	13
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	14
United States v. *Speed*, 78 F. Supp. 366	13
United States v. *Thompson*, 214 F. 2d 545 (C.A. 2), certiorari denied, 348 U.S. 841	2
Wilson v. *United States*, 158 F.2d 659, certiorari denied, 330 U.S. 850	17

Statutes and Rules:

18 U.S.C. 3	2, 13
18 U.S.C. 1071	2–3
18 U.S.C. 2385	2, 16
18 U.S.C. 3052	9
Fed. Rules of Crim. Procedure: Rule 52(a)	17

Miscellaneous:

Bishop *Criminal Law* [9th ed.], § 692	14
4 Blackstone, *Commentaries* 37	14

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, AND SIDNEY STEINBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions in the Court of Appeals are reported at 231 F. 2d 155 (Pet. App. 4-73; R. 944-993).

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1956 (Pet. App. 4). A petition for rehearing was denied on April 20, 1956 (Pet. App. 75). On May 5, 1956, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to June 18, 1956. The petition was filed on June 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the circumstances surrounding the surveillance of petitioners gave probable cause to arrest them and, as an incident thereto, to search without a warrant the premises in which they were found.

2. Whether Sections 3, 371, and 1071 of Title 18 of the United States Code were unconstitutionally applied to petitioners.

3. Whether the indictment sufficiently charged petitioners with the crime of which they were convicted.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of 18 U. S. C. 3, 371, and 1071 are set forth in the Appendix to the petition (Pet. App. 77-78), as are the constitutional provisions involved.

STATEMENT

On October 22, 1953, a four count indictment was returned against petitioners and others.[1] The first count charged petitioners with being accessories after the fact in violation of 18 U. S. C. 3, by receiving, relieving, comforting and assisting Robert G. Thompson, a convicted Smith Act (now 18 U. S. C. 2385) fugitive, knowing him to be such;[2] the second count charged all the petitioners with conspiracy to violate 18 U. S. C. 3. The third count charged the petitioners, except Steinberg, with violating 18 U. S. C. 1071, by harboring and

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[1] At the end of the Government's case, the trial court acquitted Patricia Blau who was also named in the indictment (R. 912). Carl Ross, another defendant named in the indictment, was convicted and has completed his sentence; he is not a party to the petition (Pet. 3, fn. 3).

[2] After his apprehension in the company of the present petitioners, Thompson was convicted of criminal contempt and sentenced to a term of four years imprisonment. *United States* v. *Thompson*, 214 F. 2d 545 (C.A. 2), certiorari denied, 348 U.S. 841.

concealing Steinberg, knowing that a warrant had been issued for his apprehension; the fourth count charged the petitioners (except Steinberg) with conspiracy to violate 18 U. S. C. 1071 (R. 3-8).

During the period charged in the indictment, both Thompson and Steinberg were fugitives from justice. Robert G. Thompson was a defendant in *United States* v. *Dennis et al.* (S. D. N. Y.), a case receiving widespread news coverage, in which eleven leaders of the Communist Party were indicted, tried, and found guilty of conspiring to violate the Smith Act (R. 893). The judgment of conviction was affirmed by the Court of Appeals for the Second Circuit (183 F. 2d 201) and then affirmed by this Court in *Dennis* v. *United States*, 341 U. S. 494. Pending the appeal, Thompson had been admitted to bail. After his conviction had been affirmed, Thompson fled rather than surrender to serve his sentence, thereby forfeiting his $20,000 bail.

Petitioner Steinberg (under the name of Sidney Stein), together with 20 others, was indicted on June 19, 1951, by a grand jury in the Southern District of New York and charged with conspiracy to violate the Smith Act (R. 893). Sixteen of the persons charged in this indictment were apprehended shortly thereafter. Petitioner and three others charged could not be apprehended at that time. After a widely publicized trial, thirteen of petitioner's co-defendants in that case were convicted of violating the Smith Act.[3]

Despite intensive efforts by the Federal Bureau of Investigation, both Thompson and petitioner Steinberg remained at large until their apprehension by agents

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[3] These convictions were affirmed in the case of *United States* v. *Flynn*, 216 F. 2d 354 (C.A. 2), certiorari denied, 348 U.S. 909.

of the Federal Bureau of Investigation on August 27, 1953, at a secluded cabin in the Sierra Nevada mountains near the small village of Twain Harte, California, in the company of Ross and petitioners Kremen and Coleman (R. 201, 340, 421-422).

Thompson, Ross, and petitioners Steinberg and Coleman were all long-time intimates. Thompson, Coleman, Ross, and Steinberg had their offices in the same building, Communist Party headquarters in New York, at approximately the same time (R. 509-512, 516). Coleman, Ross, and Steinberg were all identified as being with or in the presence of Thompson on numerous occasions, including conventions and meetings (R. 519-523, 855-856, 857). At approximately the same time that Thompson and petitioner Steinberg became fugitives from justice, petitioner Coleman and Ross left their families and homes (R. 609-615).

Petitioner Kremen, under the assumed name of Mrs. Lee Kaplan (R. 619, 621), rented the cabin near Twain Harte. She specified that she wanted "a spot where it would be quiet and rather secluded" (R. 620) for her "brother" (R. 620) who was "sick with nerves" (R. 620). In renting this particular cabin, she stated that she liked it because it was "very quiet" (R. 621).[4]

Petitioner Steinberg identified himself as "Mr. Newberg", and petitioner Kremen as his "sister", to the owner of the cabin (R. 669-670). Steinberg also introduced Ross as a "buddy" of his (R. 671). Steinberg

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[4] Petitioners' attorney, apparently realizing how damaging this testimony was, subjected the real estate agent to a lengthy and repetitious cross-examination which covered more than thirty pages (R. 627-656, 662-665). The trial judge was finally forced to limit the cross-examination of this witness because it had "come to the point of badgering" (R. 654).

seemed to be the host or household head at the cabin, extending an invitation to have breakfast to the owner, Mr. Germany (R. 669), and ordering Mrs. Kremen to pay Germany for a light bill (R. 671).

Petitioner Kremen was in charge of procurement. In the period preceding the arrest, she made several purchases of large quantities of food (R. 682-683, 778-781). On one occasion, she and a man attempted to purchase hair dye (R. 683).[5] Mrs. Kremen also performed various household tasks for the occupants of the cabin and hired a repairman to fix the cabin pump (R. 194, 669, 695). In the company of Thompson and Steinberg, Mrs. Kremen purchased a pair of swim trunks "for a friend that was ill at the time" (R. 700-702).

It appeared at the trial that petitioner Coleman was with Thompson for some time prior to their apprehension. On June 5, 1953, Coleman purchased a Hudson automobile in St. Louis, Missouri, using the assumed identity of "William Gordon" (R. 548, 549).[6] The keys to this automobile were found in Thompson's pocket when he was apprehended (R. 430, 555, 558). Coleman (under the name of "Gordon") and Thompson were members of a party of four which rented boats at a resort in Camdenton, Missouri, on July 4, 1953 (R. 565, 576). In Bigfork, Montana, Thompson purchased a fishing license under the false name of "J. F. Brennan" (R. 596-597). Using their false names, Thompson and Coleman stayed at a cabin some 30 miles from Bigfork from August 10 to August 17, 1953 (R.

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[5] When apprehended, Thompson had dyed red hair and a moustache dyed red (R. 326).

[6] Indicating that speed was essential, Coleman stated he wanted the car "as soon as possible" and paid for it in cash (R. 549).

601). They used a Hudson automobile with Missouri license plates on this trip (R. 602). The Hudson automobile purchased by "Gordon" in Missouri entered California on August 20, 1953 (R. 409-410, 412). Also, Coleman and Thompson were seen together in Twain Harte prior to their arrest (R. 701, 709).

Thirty minutes after positive identification of Thompson and petitioner Steinberg had been made on August 27, 1953, at Twain Harte (R. 197, 323-324), agents of the Federal Bureau of Investigation arrested Thompson, Ross and the present petitioners. At the time of the arrest, Thompson and Steinberg were in the clear area in front of the cabin, while Ross and petitioners Kremen and Coleman were inside the house (R. 201). It was apparent that Thompson, Ross and the petitioners had spent the night at the cabin and were well established there (R. 189, 192-195, 210-212; G. Exs. 14-18, A-1 through A-14). Both Thompson and petitioner Steinberg had altered their physical appearance considerably, so that they looked much different than they had when they became fugitives. Thompson had dyed his hair, gained much weight and had grown a mustache since he left New York (R. 325-326). Steinberg had cropped his hair short, had grown a mustache, and was much thinner both in face and body (R. 325). When apprehended, none of the occupants of the cabin had any visible means of support. However, Thompson's wallet contained approximately $363 (R. 432) and approximately $450 was found in a belt on a chair in the cabin (R. 376-377).

The F. B. I. agents made a search of the cabin and of the persons of the five individuals apprehended at the time of the arrest. Thompson and petitioner Stein-

berg had elaborate documentary proof of false identities and were using aliases. Thompson had no less than twelve documents identifying him as "John F. Brennan" (R. 432-434; G. Ex. 97). Steinberg admitted ownership of a wallet containing false identification in the name of "Joshua Newberg", supposedly a teacher of violin and mandolin (R. 331, 334-336). Other identification for "Joshua Newberg" was found in the cabin (R. 232; G. Exs. 23, 24, 25).

Petitioner Kremen's purse contained a library card, a fire permit, a Social Security card, an identification card, and an automobile operator's license, all in the name of "Lee Kaplan"; she also had some bills and an invoice containing the name of "Richard Kaplan" (R. 362-363; G. Ex. 86). False identification documents for "William Gordon", the name assumed by petitioner Coleman (R. 548, 549, 575-576), were found in a wallet discovered in the cabin (R. 899).

Ross was positively identified as the man who purchased a duplicating machine [7] and some supplies under the name of "R. E. Newman" (R. 716, 718, 720; G. Ex. 114, 115); in addition, false identification documents, a Social Security card, and a driver's license in the name of "Robert Newman" were found in a billfold in the cabin (R. 379, 899-901, G. Ex. 91).[8] A letter found on Ross's person indicated that he was to meet someone

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[7] This machine was found in the cabin at the time of petitioners' arrest (R. 718-720).

[8] A document in the wallet contained the following cryptic information:

> Local Police Rear of libe ref room.
> Atlas open to map of California.
> Person entering carries Colliers.
>
> (R. 900; G. Ex. 91)

and receive instructions (R. 208; G. Ex. 7).[9] He also had on his person a grocery list for large quantities of food (R. 207-208).

After various pretrial motions (R. 18, 21, 22) for suppression and return of property found at the cabin at the time of arrest had been disposed of,[10] the trial commenced. Following the impaneling of the jury, petitioners apparently made another motion to suppress (R. 163, 183) which was denied on April 13 (R. 73). During the trial, petitioners made motions to suppress on the grounds that the search was "illegal and improper" (R. 202, 204, 216, 217, 219, 220, 228, 231, and various other times throughout the trial). These were all denied.

Petitioners and Ross were found guilty by the jury on all counts against them. Mrs. Kremen was sentenced to one year on counts 1 and 2, and to six months on counts 3 and 4, all to run concurrently. Coleman was sentenced to one year on count 1 and one year on count 2, and to six months each on counts 3 and 4, all to run consecutively. Steinberg was sentenced to two years each on counts 1 and 2, to run consecutively. The convictions were affirmed by the Court of Appeals, Chief Judge Denman dissenting.

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[9] The pertinent portion of the letter reads as follows:

> The person on this end of arrangement is being instructed to break off with your lady until he makes certain other arrangements. As previously agreed, contact from your end to be with S, with whom we are in contact. S will explain further and make necessary further arrangements.

[10] Petitioners' motion of February 8, 1954, was denied on the ground that petitioners did not allege any interest in the property found on the premises searched (R. 26-28); petitioner's motion of April 5, 1954, was taken off the calendar by stipulation (R. 73).

ARGUMENT

1. Petitioners Kremen and Coleman contend (Pet. 15-22) that evidence taken from their persons should not have been admitted against them because their arrest was made without warrant [11] and without probable cause for belief that they had committed or were committing a felony. All three petitioners complain of the search of the cabin and the seizure of the material found there.

(a). An agent of the F. B. I. may lawfully arrest without a warrant persons whom he has probable cause to believe have committed or are committing a felony in his presence. 18 U. S. C. 3052. As this Court has frequently observed, there is no precise formula for determining probable cause or reasonableness; each case must be viewed in the light of its own facts and circumstances. *United States* v. *Rabinowitz*, 339 U. S. 56, 60, 63; *Brinegar* v. *United States*, 338 U. S. 160, 172-176; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357. It is clear that the standard of proof required to show probable cause is far less stringent than that required to establish guilt; and that nothing more is required to justify an arrest than that the circumstances known to the officer, by personal observation or by reasonably trustworthy information, were such as would justify a man of reasonable caution in the belief that a felony had been or was being committed.[12] *Brinegar* v. *United*

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[11] The arrest of Steinberg was made pursuant to a valid bench warrant issued for his arrest in New York on June 20, 1950 (R. 900; 201), and is not in issue here.

[12] Contrary to petitioners' suggestion (Pet. 16), in determining the existence of probable cause for an arrest without a warrant, it is not necessary to exclude every hypothesis of innocence. *United States* v. *Bianco*, 189 F. 2d 716, 720 (C.A. 3); see also *Brinegar* v. *United States*, *supra*.

States, supra; Carroll v. *United States,* 267 U. S. 132, 161-162.

Here, the agents of the F. B. I. were not positive that Thompson and Steinberg were among those at the cabin until thirty minutes before the arrest (R. 197, 323-324). Until these fugitives had been identified, the agents did not have probable cause to arrest those present or to secure a search warrant. Once the fugitives were identified, there was certainly probable cause to believe that a felony—being accessory after the fact—was being committed in the very presence of the agents. Since these two men had successfully evaded apprehension for more than two years, and there were two automobiles near the cabin, the agents would have been derelict in their duty if they delayed in making the arrest. In the circumstances facing them, the agents cannot have been required to travel from remote Twain Harte in the Sierra Nevada mountains to the nearest United States Commissioner or District Judge, and then back again, before making the arrests. *United States* v. *Rabinowitz,* 339 U. S. 56, states the rule (at page 65):

> The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

(b). As for the search, it is settled that the person of one lawfully arrested as well as the premises in which the arrest is made may be reasonably searched, and that

things found may be used in evidence at the trial. *United States* v. *Rabinowitz*, 339 U. S. 56, 61; *Agnello* v. *United States*, 269 U. S. 20, 30; *Marron* v. *United States*, 275 U. S. 192, 199; *United States* v. *Lindenfeld*, 142 F. 2d 829, 832 (C. A. 2), certiorari denied, 323 U. S. 761, and cases cited therein.

Petitioners assert (Pet. 16), however, that the search of the cabin was "utterly unreasonable", particularly because the items found were not criminal to possess (Pet. 19-20). But it is not the law that the only material which can be seized is contraband; instrumentalities of the crime or things which directly further and aid the commission of the offense can certainly be taken. In *Marron* v. *United States*, 275 U. S. 192, 198-199, for instance, bills for gas, electricity, water and telephone service, a ledger, and liquor were seized.[13] Similarly here, the items seized and introduced at the trial were not merely evidence of guilt; they were equivalent to devices used directly in the commission of the particular crimes with which petitioners were charged. In general, the only seized documents which were introduced were false identity papers which were used to safeguard Thompson and Steinberg from any risk that petitioners' true names would lead to the arrest of the fugitives and certain notes in the possession of Ross, who is not a petitioner. The false identification documents taken during the search bear the same relation to petitioners' crime as did the "burglar tools, gambling paraphernalia, and illicit liquor" (Pet. 20) to the

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[13] In *United States* v. *Rabinowitz*, 339 U.S. at 62, this court made a special point of saying that "[w]e do not understand the *Marron* case to have been drained of contemporary vitality by *Go-Bart Co.* v. *United States*, 282 U.S. 344, and *United States* v. *Lefkowitz*, 285 U.S. 452."

crimes involved in the cases accepted as correct by petitioners. They were the instrumentalities through which the crime was carried out. By the same token, it was not improper for the officers to search "all parts of the premises used for the unlawful purpose" of harboring and concealing the fugitives. The cabin was itself a prime instrumentality of the crime. See *Marron* v. *United States*, 275 U. S. 192, 199; *Harris* v. *United States*, 331 U. S. 145; *United States* v. *Rabinowitz*, 339 U. S. 56.

2. Petitioners' second point (Pet. 23-33) is that the harboring and accessory provisions of the criminal code were unconstitutionally applied to them in three different fashions.

(a). They contend (Pet. 23-27) that they were "placed in double jeopardy by an unconstitutional pyramiding of offenses," in that they were convicted of two substantive and two conspiracy offenses arising out of the very same set of acts. But it is conceded (Pet. 23), as it must be, that a single act may supply the basis for conviction of two or more offenses as long as each requires the proof of a fact not essential to the other (*Pereira* v. *United States*, 347 U. S. 1, 9), and it is clear that the substantive offenses here are substantially different in that sense. All three petitioners sought to "hinder or prevent" the "punishment" of Thompson by rendering him aid, comfort and assistance; Kremen and Coleman harbored and concealed Steinberg "to prevent his discovery and arrest." These are two separate and distinct crimes accomplishing different purposes.

Nor were the conspiracy counts improperly added, since conspiracy is normally a crime separate and apart

from the substantive offense which is its object. *Pinkerton* v. *United States*, 328 U. S. 640, 644. Only where two or more persons must *necessarily* agree in order to accomplish the substantive crime is the conspiracy offense merged. See *United States* v. *Katz*, 271 U. S. 354. That is not true here. Petitioners concede that the crimes of harboring and accessoryship are capable of being committed by "one person alone" (Pet. 25), and the record shows, as in many comparable cases, that each individual petitioner could and did perform the acts constituting the substantive offenses at the same time that they also agreed and acted together to commit those crimes. See *Pereira* v. *United States*, 347 U. S. 1, 11-12.[14]

(b). 18 U. S. C. 3, petitioners next say (Pet. 28-30), cannot apply where the principal offender (here Thompson) has already been convicted. Aside from its strange frustration of the clear statutory purpose to deter aid and comfort to known offenders, the main defect in this argument is that 18 U. S. C. 3 (Pet. 77) expressly defines the crime of accessory after the fact to include "[w]hoever * * * hinder[s] or prevent[s] his * * * apprehension, trial *or punishment*" (emphasis added), and punishment, of course, can only be rendered after conviction. This accords with the com-

[14] Petitioners also argue (Pet. 26-27) that "the prosecution split what was at most a single conspiracy into two separate conspiracies". But the test of whether activities constitute a single conspiracy or multiple conspiracies is the object of these activities. *United States* v. *Rosenberg*, 195 F. 2d 583, 600-601 (C.A. 2), certiorari denied, 344 U.S. 838; *United States* v. *Speed*, 78 F. Supp. 366, 368-369 (D. D.C.); cf. *Kotteakos* v. *United States*, 328 U.S. 750, 769. Here, there were multiple objectives, and therefore multiple conspiracies. The jury could well find two separate and distinct objectives and conspiracies: 1) to harbor Steinberg, and 2) to give aid, comfort, and assistance to Thompson.

mon law which declared that aid rendered to a known felon for the purpose of preventing his punishment, before or after his conviction, rendered the aider an accessory. Bishop, *Criminal Law* [9th ed.], Section 692, p. 497; 4 Blackstone, *Commentaries*, 37, 38; *Elmendorf* v. *Commonwealth*, 188 S. W. 483; *Rex* v. *Greenacre*, 8 Car & P. 35.

(c). Petitioners also contend (Pet. 30-33) that their convictions were obtained without sufficient proof of *scienter*. But if one recognizes the almost-impossibility of proving a mental state by direct evidence (*Holland* v. *United States*, 348 U. S. 121, 140), and accepts the settled principle that *scienter* may be inferred from the facts and circumstances (*Morrisette* v. *United States*, 342 U. S. 246, 276; *Nassan* v. *United States*, 126 F. 2d 613 (C. A. 4)), it becomes plain, we submit, that in this case there is substantial evidence to sustain the jury's verdict. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80.

Petitioners were apprehended under very suspicious circumstances. At the time of their arrest, they were residing in a very secluded mountain cabin under assumed names in the company of well-known fugitives from justice. Coleman and Steinberg were long-time cohorts of Thompson at New York Communist Party headquarters (R. 505-513). Coleman supplied Thompson with a car (R. 430, 555, 558), and accompanied him around the country (R. 565, 596, 601,603); Steinberg was in charge of and host at the cabin (R. 670-671). They knew that Thompson was using a false name and had materially altered his appearance. It strains credulity that Communist Party members of their status

would not know of the conviction and escape of a top Communist Party leader. See also *supra*, pp. 3-4, 5-8.[15]

Mrs. Kremen rented a cabin for her supposedly sick brother (R. 620-622). Her "sick brother" turned out to be Steinberg who was neither ill nor related to her, and who at that time was also a fugitive. She used a false name and possessed elaborate documentary indicia of a false identity (R. 362, 363; G. Ex. 86). She purchased large quantities of food (R. 676, 685, 778), bought sporting supplies (R. 701-702), performed household tasks for the occupants of the cabin (R. 193-194, 669), and saw to the maintenance of at least one of the vehicles (R. 787-789). On one of her shopping expeditions, her male companion purchased hair dye (R. 683). When apprehended, Thompson had dyed his hair and moustache (R. 326). The only rational explanation presented to the jury for these activities—the explanation proffered by the Government—was that she wished to prevent the apprehension of Steinberg and Thompson. On the record made at the trial there is no other reasonable explanation. In *Holland* v. *United States*, 348 U. S. 121, 138-139, the Court stated that "once the Government has established its case, the defendant remains quiet at his peril." The jury was therefore justified in making the inference obviously presented by the evidence.[16]

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[15] Although Chief Judge Denman dissented below, he would sustain the convictions on the accessoryship substantive and conspiracy counts against petitioners Coleman and Steinberg (231 F. 2d at 182; Pet. App. 71-72).

[16] Petitioners' reliance upon *Fulbright* v. *United States*, 91 F. 2d 210 (C.A. 8) is misplaced. In that case, there was evidence that the defendants thought the principal offender was a fugitive from *state* process. Here, petitioners failed to introduce any evidence

3. Petitioners' third point (Pet. 33-37)—relating to the wording of counts 1 and 2 of the indictment and a charge of "fatal variance" between those allegations and the proof at the trial—is wholly based on the fact that these counts, in describing the offense of which Thompson was convicted, did not contain all the language of Section 2 of the Smith Act.[17]

But the question is not whether there has been a technical variance in proof but whether there has been such a variance as to affect the substantial rights of the accused. *Berger* v. *United States,* 295 U. S. 78, 82; *United States* v. *Cohen,* 145 F. 2d 82 (C. A. 2), certiorari denied, 323 U. S. 799; *Smiley* v. *United States,* 186 F. 2d 903, 905 (C. A. 9). That does not exist here. Petitioners' complaint is not really directed at the sufficiency of the indictment, but at the incidental recitals of Thompson's offense. Counts 1 and 2 both allege that Thompson had violated "Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act," and that description was enough to put petitioners on notice. Count 1 also charged petitioners with being accessories after the fact to Thompson who had been convicted of "conspiring to (1) organize a society for the overthrow of the Government of the United States by force and violence" (R. 3).[18] This is a compressed para-

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that Thompson and Steinberg were being hidden for any reason other than to prevent Thompson's punishment and Steinberg's arrest.

[17] Sections 2, 3 and 5 of the Smith Act were first codified in Sections 10, 11 and 13 of Title 18 of the United States Code, in 1940. In the present title 18, U.S.C., these sections, with certain modifications, are contained in Section 2385.

[18] Petitioners make no complaint as to the second part of count 1 which stated that Thompson had also been convicted of conspiring to "(2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence; . . ." (R. 3).

phrase of the language Chief Justice Vinson used in describing the conclusions of the Court of Appeals for the Second Circuit in upholding that court's decision affirming the conviction of Thompson and ten other Communist Party leaders,[19] and in any event there can be no doubt that petitioners and their lawyers knew precisely to what conviction the indictment referred.

The indictment thus fully apprised petitioners of the offense with which they were charged and will stand as a bar to any prosecution for accessory after the fact to Thompson's crime. This is all that is required. *Hagner* v. *United States,* 285 U. S. 427, 431; *Wilson* v. *United States,* 158 F. 2d 659 (C. A. 5), certiorari denied, 330 U. S. 850. It is enough that the essential elements of the offense appear in any form, or by fair construction can be found within the terms of the indictment, considered as a whole. *Hagner* v. *United States, supra,* at 433; *McCoy* v. *United States,* 169 F. 2d 776, 780 (C. A. 9), certiorari denied, 335 U. S. 898. Any error, defect, irregularity, or variance which does not affect substantial rights is disregarded. Rule 52(a), F. R. Crim. P. Clearly, petitioners were not prejudiced here.

The petitioners further contend (Pet. 36) that the trial judge erred in removing from the jury the issue of whether or not Thompson had actually been convicted of the offense alleged in the indictment. However, petitioners did not, and could not, contest the fact

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[19] Chief Justice Vinson's opinion stated that the Court of Appeals had concluded that the Communist Party's policy "worked for the overthrow of the Government by force and violence; * * * that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence." *Dennis* v. *United States,* 341 U.S. 494, 498.

that Thompson had been convicted of violating the Smith Act. As the record stands, there was no issue of fact for the jury to decide. Thompson's conviction was indisputably a fact and the trial judge properly withdrew from the jury's consideration that phase of the case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	3
Statement	4
Summary of argument	15
Argument	21
I. None of the search-and-seizure questions raised by petitioners should be reached. Petitioners utterly failed to make a showing sufficient to raise the issue of their right to have the seized property suppressed, though invited by the District Court and given every opportunity to make such showing	21
II. In any event, the search and seizure were lawful incidents to valid arrests	24
A. The arrests were valid	24
B. The search of petitioners and of the premises was a lawful incident to lawful arrests	31
III. Petitioners' convictions are not based on unconstitutional or otherwise invalid applications of the harboring, accessoryship, and conspiracy statutes	43
A. Petitioners' convictions do not involve "an unconstitutional pyramiding of offenses"	44
1. It is not correct, as petitioners claim, that there was at most one substantive offense because "all of the proof which established the harboring of Steinberg also established the accessoryship after the fact to the Thompson conviction"	44

Argument—Continued
III. Continued
A.—Continued
2. The convictions under the conspiracy counts were not the result, as petitioners claim, of a "splitting" into "two separate conspiracies" of "what was at most a single conspiracy"..... 48
3. The offense charged in each of the conspiracy counts is not the same offense as that charged in the corresponding substantive count..... 53
B. Receiving and assisting one who, having already been convicted of an offense against the United States, has fled from justice, in order to hinder and prevent his apprehension and punishment, constitutes, within the meaning of 18 U. S. C. 3, accessoryship after the fact to the offense of which the fugitive was convicted..... 55
C. The element of *scienter* was clearly proven against all petitioners..... 61
IV. The fact that the accessoryship count at one point mistakenly referred to the principal offense as conspiracy to organize a society for "the overthrow" (rather than "advocating the overthrow") of the Government by force did not prejudice petitioners, who were clearly apprised of the nature of the charge..... 64
Conclusion..... 68

Page

CITATIONS

Cases:

Agnello v. *United States*, 269 U. S. 20..... 22, 33, 34, 35
Bell v. *United States*, 349 U. S. 81..... 46, 47
Berger v. *United States*, 295 U. S. 78..... 67
Blockburger v. *United States*, 284 U. S. 299..... 45
Brinegar v. *United States*, 338 U. S. 160..... 26
Carney v. *United States*, 163 F. 2d 784..... 43

Cases—Continued

	Page
Coplon v. *United States*, 185 F. 2d 629, certiorari denied, 342 U. S. 920	27
Dennis v. *United States*, 341 U. S. 494	5, 66
Dent v. *State*, 43 Tex. Cr. 126, 65 S. W. 627	58
Fulbright v. *United States*, 91 F. 2d 210	30
Gaskins v. *United States*, 218 F. 2d 47	22
Gavieres v. *United States*, 220 U. S. 338	45
Gebardi v. *United States*, 287 U. S. 112	54
Go-Bart Importing Co. v. *United States*, 282 U. S. 344	34, 42
Goldstein v. *United States*, 316 U. S. 114	22
Gouled v. *United States*, 255 U. S. 298	41
Hagner v. *United States*, 285 U. S. 427	66
Harris v. *United States*, 331 U. S. 145	16, 33, 35, 36
Hirabayashi v. *United States*, 320 U. S. 81	44
Holland v. *United States*, 348 U. S. 121	61, 63
Kelley v. *United States*, 61 F. 2d 843	37
Ladner v. *United States*, 230 F. 2d 726	47
Lanzetta v. *New Jersey*, 306 U. S. 451	56
Marron v. *United States*, 275 U. S. 192	33, 35, 37, 38
Matthews v. *Correa*, 135 F. 2d 534	35
McCoy v. *United States*, 169 F. 2d 776, certiorari denied, 335 U. S. 898	65, 66
McDonald v. *United States*, 335 U. S. 451	42
Morissette v. *United States*, 342 U. S. 246	61
Nassan v. *United States*, 126 F. 2d 613	61
Nilva v. *United States*, 212 F. 2d 115, certiorari denied, 348 U. S. 825	49
Oddo v. *United States*, 171 F. 2d 854	47
Oliver v. *United States*, 121 F. 2d 245, certiorari denied, 314 U. S. 666	49
Pereira v. *United States*, 347 U. S. 1	45, 54
Pierce v. *United States*, 314 U. S. 306	56
Pinkerton v. *United States*, 328 U. S. 640	20, 44, 54
Piquett v. *United States*, 81 F. 2d 75, certiorari denied, 298 U. S. 664	47
Rex v. *Burridge*, 3 P. Wms. 439, 24 Eng. Reprint 1133	20, 58, 59, 60
Robinson v. *United States*, 143 F. 2d 276	47
Scoggins v. *United States*, 202 F. 2d 211	22
Sengstack v. *Hill*, 16 F. Supp. 61	56

Cases—Continued

	Page
Short v. *United States*, 91 F. 2d 614	47
Skelly v. *United States*, 76 F. 2d 483, certiorari denied, 295 U. S. 757	49
Smiley v. *United States*, 186 F. 2d 903	67
Stacey v. *Emery*, 97 U. S. 642	26
Steeber v. *United States*, 198 F. 2d 615	22
Trupiano v. *United States*, 334 U. S. 699	33
United States v. *Bianco*, 189 F. 2d 716	30
United States v. *Cohen*, 175 F. 2d 82, certiorari denied, 323 U. S. 799	67
United States v. *Coplon*, 185 F. 2d 629	27
United States v. *Di Re*, 332 U. S. 581	30, 42
United States v. *Eversole*, 209 F. 2d 766	22
United States v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U. S. 909	5
United States v. *Georga*, 210 F. 2d 45	49
United States v. *Glasser*, 116 F. 2d 690, modified, 315 U. S. 60	49
United States v. *Heitner*, 149 F. 2d 105	30
United States v. *Jeffers*, 342 U. S. 48	15, 21, 22
United States v. *Katz*, 271 U. S. 375	54
United States v. *Lefkowitz*, 285 U. S. 452	42
United States v. *Lindenfeld*, 142 F. 2d 829	35
United States v. *Rabinowitz*, 339 U. S. 56	16, 25, 32, 33, 35, 36
United States v. *Rosenberg*, 195 F. 2d 583, certiorari denied, 344 U. S. 838	48
United States v. *Speed*, 78 F. Supp. 366	49
United States v. *Thompson*, 214 F. 2d 545, certiorari denied, 348 U. S. 841	4
United States v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218	47
United States v. *Weitzel*, 246 U. S. 533	56
Weeks v. *United States*, 232 U. S. 383	40
West v. *Cabell*, 153 U. S. 78	25
Wilson v. *United States*, 158 F. 2d 659, certiorari denied, 330 U. S. 850	66
Wilson v. *United States*, 218 F. 2d 754	22
Constitution:	
Fourth Amendment	31, 43

Statutes and Rules:	Page
Act of January 10, 1951, c. 1221, § 1, 64 Stat. 1239	3, 16
Federal Rules of Criminal Procedure:	
Rule 4 (b) (1)	25
Rule 4 (c) (3)	25
Rule 7 (c)	65
Rule 41 (e)	15, 23, 24
Rule 52 (a)	21, 66
18 U. S. C. 3	4, 20, 43, 45, 56
18 U. S. C. 371	4, 43
18 U. S. C. 1071	5, 43, 46
18 U. S. C. 2385	4
18 U. S. C. 3052	3, 26
Public Law 557 83d Cong., 2d Sess.	10
Congressional Materials:	
96 Cong. Rec. 14660	27
96 Cong. Rec. 16934	27
Communist Underground Printing Facilities and Illegal Propaganda, Hearing before the Subcommittee To Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, Senate, 83d Cong., 1st Sess.	10
H. Rep. No. 1928, 83d Cong., 2d Sess.	46
H. Rep. No. 2194, 83d Cong., 2d Sess.	10
H. Rep. No. 3228, 81st Cong., 2d Sess.	27
S. 3945, 81st Cong., 2d Sess.	27
Sen. Rep. 1433, 83d Cong., 2d Sess.	10
Sen. Rep. No. 2141, 83d Cong., 2d Sess.	46
Sen. Rep. No. 2464, 81st Cong., 2d Sess.	27
Miscellaneous:	
Bishop, *Criminal Law* Vol. 1 (9th ed.), § 695	57
Bishop, *Criminal Law* Vol. 2 (9th ed.), § 1069	58, 60
4 Blackstone, *Commentaries*, 37	57

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, AND SIDNEY STEINBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the Court of Appeals (R. 943–992) are reported at 231 F. 2d 155.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1956 (R. 992–993). A petition for rehearing was denied on April 20, 1956 (R. 993). On May 7, 1956, Mr. Justice Douglas extended the time

[1] Each member of the three-judge panel wrote a separate opinion. Judge Lemmon wrote the principal "affirming opinion" (R. 943–984), Judge Healey wrote a brief concurring opinion (R. 984–985), and Chief Judge Denman wrote a dissenting opinion (R. 985–992).

for filing a petition for a writ of certiorari to June 18, 1956 (R. 993). The petition was filed on June 14, 1956, and was granted on October 8, 1956 (R. 994). 352 U. S. 819. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether in the circumstances shown petitioners have standing to raise the issue of their right to have the seized property suppressed.

2. Whether the search without a search warrant of the premises involved, conducted incident to the arrests of petitioners and others—two of them arrested pursuant to warrant for their arrest, the others arrested for committing a felony in the arresting officers' presence—was reasonable in the circumstances of this case.

2. Whether petitioners' convictions are based on unconstitutional or otherwise invalid applications of the harboring, accessoryship after the fact, and conspiracy statutes in that, allegedly,—

(a) at most one substantive offense was proved, because there was no element which was required to be proved under the count charging the harboring of Steinberg which did not also have to be proved under the count charging accessoryship after the fact to Thompson's violation of the Smith Act, and *vice versa;*

(b) there was no proof of more than one conspiracy;

(c) the offense charged in each of the conspiracy counts is the same offense as that charged in the corresponding substantive count;

(d) accessoryship after the fact to another's offense is incapable of being committed where the principal offender has already been convicted;

(e) the evidence is insufficient to establish that petitioners knew that Thompson had been convicted of violation of the Smith Act and that a warrant for Steinberg's arrest was outstanding.

4. Whether, by virtue of the fact that the accessoryship count at one point mistakenly referred to the principal offense (which was otherwise correctly described) as conspiracy to organize a society for "the overthrow" (rather than "advocating the overthrow") of the Government by force, petitioners were not adequately apprised of the nature of the charge against them; and whether, because of the same error, there was a fatal variance between the pleading and the proof.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and three of the statutes (18 U. S. C. 3, 371, and 1071) involved are set forth at pp. 3–4 of petitioners' brief. Another pertinent statute, 18 U. S. C. 3052 (as amended by the Act of January 10, 1951, c. 1221, § 1, 64 Stat. 1239), provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their

presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

STATEMENT

On September 16, 1953 (R. 9), a four-count indictment (R. 3–8) was filed in the United States District Court for the Northern District of California against the three petitioners involved herein—Shirley Kremen, Samuel Irving Coleman, and Sidney Steinberg—and two others, Carl Ross and Patricia Blau.[2] The first count (R. 3–4) charged all five of these individuals with accessoryship after the fact, in violation of 18 U. S. C. 3, to Robert G. Thompson's violation of the Smith Act (now 18 U. S. C. 2385), by receiving, relieving, comforting and assisting Thompson (at the time a fugitive from justice), knowing of his having been convicted of that offense.[3] The second count (R. 4–6) charged the same five individuals with conspiracy, in violation of 18 U. S. C. 371, to commit the offense charged in the first count. The third count (R. 6) charged four of the same individuals—all except Steinberg—with having harbored and concealed Steinberg in order to prevent his discovery and arrest, knowing that a warrant had been issued for his

[2] Blau was granted a judgment of acquittal at the end of the Government's case (R. 912). Ross was convicted, but, having completed his sentence, was not a party to the petition for certiorari (see Br. 6, fn. 7).

[3] After his apprehension in the company of the present petitioners, Thompson was convicted of criminal contempt and sentenced to a term of four years' imprisonment. *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841.

apprehension,[4] in violation of 18 U. S. C. 1071. The fourth count (R. 6–8) charged the same individuals named in the third count with conspiracy to commit the offense charged in that count. Thompson was named in the fourth count as a "co-conspirator but not as a defendant" (R. 7).

At the time of the commission of the offenses alleged in the indictment, both Thompson and Steinberg were fugitives from justice. Thompson was one of the eleven Communist Party leaders who had been convicted in the widely publicized New York prosecution which culminated in *Dennis* v. *United States*, 341 U. S. 494 (R. 893). Pending his appeal from that conviction, Thompson had been admitted to bail. After his conviction had been affirmed by the Second Circuit and this Court, Thompson fled rather than surrender to serve his sentence, thereby forfeiting bail in the amount of $20,000. Upon Thompson's failure to surrender himself, a warrant for his arrest was issued on July 2, 1951 (R. 894). Steinberg (under the name of Sidney Stein) was one of 20 individuals who had been indicted in the Southern District of New York, on June 19, 1951, charged with conspiracy to violate the Smith Act (R. 893). A bench warrant had been issued for his arrest (R. 892–893), but he and three others of those named in the indictment could not be located and apprehended at the time. After a widely publicized trial, thirteen of Steinberg's co-defendants in that case were convicted.[5]

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[4] For violation of the Smith Act.

[5] These convictions were subsequently affirmed in the case of *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909.

Despite intensive efforts by the Federal Bureau of Investigation to find them, both Thompson and petitioner Steinberg remained at large until their apprehension by agents of the Bureau on August 27, 1953, at a secluded cabin in the Sierra Nevada mountains, near the small village of Twain Harte, California, in the company of Ross and petitioners Kremen and Coleman (R. 201, 340, 421–422).

Thompson, Steinberg, Ross, and Coleman were all long-time intimates. They all had offices in the same building, the New York headquarters of the Communist Party, at approximately the same time (R. 509–512, 516). Steinberg, Ross, and Coleman were all identified as having been with or in the presence of Thompson on numerous occasions, including Party conventions and meetings (R. 519–523, 855–856, 857). At approximately the time that Thompson and Steinberg became fugitives from justice, Coleman and Ross left their families and homes (R. 609–615).

On June 20, 1953, petitioner Kremen, under the assumed name of Mrs. Lee Kaplan (R. 619–621), rented the cabin near Twain Harte. She specified that she wanted "a spot where it would be quiet and rather secluded" for her "brother", who, she told the real estate broker, was "sick with nerves" (R. 620). In renting this particular cabin, she stated that she liked it because it was "very quiet" (R. 621).[6]

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[6] Petitioners' attorney subjected the real estate agent to a lengthy and repetitious cross-examination which covered more than thirty pages (R. 627–656, 662–665). The trial judge finally limited the cross-examination of this witness on the ground that it had "come to the point of badgering" (R. 654).

Petitioner Steinberg identified himself to the owner of the cabin as "Mr. Newberg" and petitioner Kremen as his "sister" (R. 669–670). He introduced Ross as a "buddy" of his (R. 671). Steinberg, who seemed to be the host or master of the household at the cabin, once extended an invitation to the owner, Mr. Germany, to have breakfast (R. 669), and on another occasion he ordered Mrs. Kremen to pay Germany for a light bill (R. 671).

Petitioner Kremen was in charge of procurement and maintenance. In addition to renting the cabin initially, she paid the monthly rental (R. 621, 629), made several purchases of large quantities of food (R. 682–683, 778–781), performed various household tasks for the occupants of the cabin (R. 193–194, 669), hired a repairman to fix the cabin pump (R. 695), and saw that the automobiles were kept in good order (R. 787–789). On one occasion, she and a man attempted to purchase hair dye (R. 683).[7]

The evidence establishes that for several months prior to their arrest with the other occupants of the cabin on August 27, 1953, Thompson and petitioner Coleman had been traveling about together in several different states. On June 5, 1953, approximately two weeks prior to petitioner Kremen's renting of the cabin in Twain Harte (*supra*, p. 6), Coleman purchased a Hudson automobile in St. Louis, Missouri, under the assumed name of "William Gordon" (R.

[7] When apprehended, Thompson's hair was dyed red and he had a mustache which was dyed red (R. 326).

548, 549).[8] The keys to this car were found in Thompson's pocket when he was apprehended (R. 430, 555, 558). On July 4, 1953, Coleman (again under the name of "Gordon") and Thompson were members of a party of four which rented boats at a resort in Camdenton, Missouri (R. 565, 576). On August 10, 1953, Thompson purchased a fishing license in Bigfork, Montana, under the assumed name of "J. F. Brennan" (R. 596–597). From August 10 to August 17, 1953, Thompson and Coleman, still using their assumed names, stayed at a cabin in Polson, Montana, some 30 miles from Bigfork (R. 601). In driving to Polson, they used a Hudson automobile with Missouri license plates (R. 602). On August 20, 1953, seven days prior to the arrests at Twain Harte, the Hudson automobile which "Gordon" (Coleman) had purchased in Missouri entered California from Oregon at Dorris, California (R. 408–410, 412, 419).

On August 27, 1953, within thirty minutes after agents of the Federal Bureau of Investigation, who had had the Twain Harte cabin under surveillance for approximately 23 hours (R. 271, 525–529),[9] had positively identified Thompson and Steinberg as occupants of the cabin (R. 197, 323–324), they, together with the other occupants—Ross and petitioners Kremen and Coleman—were arrested by the agents. The arrests of Thompson and Steinberg were made pursuant to outstanding warrants for their arrest which had been

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[8] Coleman stated that he wante he car "as soon as possible" and paid for it in cash (R. 549).

[9] It was only during the last six hours of this period, however, that the surveillance was continuous (R. 271–272).

issued by the United States District Court for the Southern District of New York (*supra*, p. 5). At the time of the arrests, which occurred shortly after 1 o'clock in the afternoon (R. 272), Thompson and petitioner Steinberg were outside and immediately in front of the cabin; Ross and petitioners Kremen and Coleman were inside the cabin (R. 201). It was apparent that all five had spent the night at the cabin and were well established there (R. 189, 192–195, 210–212; G. Exs. 14–18, A–1 through A–14). Both Thompson and Steinberg had altered their physical appearances considerably during the two-year period in which they had been fugitives. Thompson had dyed his hair red, had gained much weight, and had grown a mustache (R. 325–326). Steinberg had cropped his hair short, had also grown a mustache, and was much thinner in face and body (R. 325). Although none of the occupants of the cabin had any visible means of support when apprehended, Thompson's wallet contained approximately $363 (R. 432), and approximately $450 was found in a belt on a chair in the cabin (R. 376–377).

The F. B. I. agents made a search of the cabin and of the persons of the five arrested individuals in order to find "anything that would be a fruit of the crime or a part of the crime" (R. 107), and seized two automobiles which were parked on the cabin premises (R. 118). Thompson and petitioner Steinberg had elaborate documentary proof of false identities. A wallet found in Thompson's pocket contained twelve documents identifying him as "John F. Brennan" (R. 432–434; G. Ex. 97). When asked if he had

any personal possessions in the cabin, Steinberg pointed out a wallet in the cabin as being his (R. 330–331). It contained false identification materials purporting to establish his identity as "Joshua Newberg", supposedly a teacher of violin and mandolin (R. 331–336). Other such "Joshua Newberg" identification documents were also found in the cabin (R. 232; G. Ex. 23, 24, 25).

Petitioner Kremen's purse contained a library card, a fire permit, a Social Security card, an identification card, and an automobile operator's license, all in the name of "Lee Kaplan"; she also had some bills and an invoice containing the name of "Richard Kaplan" (R. 362–363; G. Ex. 86). False identification documents for "William Gordon", the name assumed by petitioner Coleman (R. 548, 549, 575–576), were contained in a wallet found in the cabin (R. 899).

Ross was positively identified as the purchaser of a duplicating machine which was found in the cabin at the time of the arrests (R. 718–720),[10] as well as of some supplies which had been purchased under the name of "R. E. Newman" (R. 716, 718, 720; G. Ex. 114, 115). In addition, a Social Security card, a driver's license, and various identification documents, all in the name of "Robert Newman", were found in

[10] The use to which such a machine can be put was demonstated at the hearings which were held on P. L. 557, 83d Cong., 2d Sess. See *Communist Underground Printing Facilities and Illegal Propaganda*, Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, Senate, 83d Cong., 1st Sess. See also H. Rep. 2194 and Sen. Rep. 1433, 83d Cong., 2d Sess.

a billfold in the cabin (R. 379, 899–901, G. Ex. 91).[11] A letter found on Ross' person indicated that he was to meet someone and receive instructions (R. 208; G. Ex. 7).[12] He also had on his person a grocery list for large quantities of food (R. 207–208).

At the time of the arrest, the special agent in charge asked petitioners to identify any property belonging to them and to specify if there was anything they wanted the F. B. I. to take care of (R. 214–215). Petitioners, however, merely stood mute (R. 215; see also R. 102). All items of personal property found in the cabin, exclusive of furniture, were transported, later that afternoon, to the F. B. I.'s headquarters in San Francisco (R. 104–105), and agents were left at the cabin to guard the premises against intruders (R. 392–393).

On February 4, 1954 (R. 21), petitioners and Ross filed a "motion for the return of seized property" (R. 18–21), asking that "all clothing, books, papers, documents, or other tangible objects obtained from the possession of the [movants] in the cabin located in the vicinity of Twain Harte * * * be returned" to

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[11] A document in this billfold contained the following cryptic information (R. 900; G. Ex. 91):

Local Police Rear of libe ref room.
Atlas open to map of California.
Person entering carries Colliers.

[12] The pertinent portion of the letter reads as follows:

The person on this end of arrangement is being instructed to break off with your lady until he makes certain other arrangements. As previously agreed, contact from your end to be with S, with whom we are in contact. S will explain further and make necessary further arrangements.

them (R. 18–19). Attached to the motion was an affidavit of petitioner Steinberg (R. 19–21), purporting to be made on behalf of himself and the other three movants (R. 19), in which he alleged, in conclusory language, that the search in question had been "unwarranted and illegal" (R. 20). The Government moved to strike the motion on the ground that it failed to state facts sufficient to warrant the relief prayed for (R. 72; see R. 26–27). On February 9, 1954, the Government's motion to strike was granted and the motion for return of the seized property denied (R. 28, 72) on the ground that the affiant, Steinberg, whose affidavit was the only one filed in support of the motion (R. 27)—

> * * * does not allege that he owned or otherwise lawfully occupied the premises searched; nor does he identify the items of property seized, if any, which he, rather than the other defendants or third parties, owned or had in his possession.
>
> * * * Moreover, the Court is unwilling to accept an affidavit made by defendant Steinberg in support of alleged Constitutional violations suffered by the other defendants.

The court's order of denial directed that the Government furnish the movants with a copy of "the summarized list of items seized" which had been furnished to the United States Attorney by the F. B. I. (R. 28), which was done (R. 109; D. Ex. A [Appendix to petitioners' brief, pp. i–xxiv]). The court's direction to make the summary available was for the stated purpose of aiding the movants in the event that

they should "choose to renew this motion buttressed by a proper showing" (R. 28).

So far as can be determined from the record, Steinberg did not thereafter amend his affidavit or file a new affidavit, nor did any of the other movants file affidavits. On March 26, 1954, however (R. 23), petitioner Kremen filed a "motion for the return of seized property and its suppression as evidence" (R. 22–23), asking for the return to her of "all money, clothing, books, papers, documents or other tangible objects" seized from the Twain Harte cabin, which was described as a "residence * * * leased to" her, and that such property "be suppressed as evidence in this proceeding as against the defendants or any of them" (R. 22). So far as appears from the record, no supporting affidavit accompanied this motion. Thereafter, on April 6, 1954, following a hearing which included the taking of some testimony (R. 89–139), the motion was ordered removed from the calendar by stipulation of counsel (R. 73). During the course of the hearing on the motion, counsel for the Government informed the court that the two automobiles which had been seized on the cabin premises on the day of the arrests (see *supra*, p. 9) had been returned to their registered owners (persons other than any of the defendants in this case), but that the government authorities had "never found out to this day who wants any of the rest of this property" or "who owns any particular part of this property" (R.

128).[13] It does not appear that any other pre-trial motion for the return of the seized property, or for the suppression of its use as evidence, was thereafter filed.[14] However, during the trial, which commenced on April 12, 1954 (R. 73), counsel for petitioners moved to suppress and exclude various items of evidence as they were offered on the ground that they had been "illegally seized" (see, *e. g.*, R. 202, 204, 216, 217, 219, 220, 228, 231). All of these motions were denied.

Each of the petitioners and Ross (see fn. 2, *supra*, p. 4) was found guilty on each of the counts in which he was named. Petitioner Kremen was sentenced to one year's imprisonment on each of counts 1 and 2, and to six months' imprisonment on each of counts 3 and 4, all four sentences to run concurrently (R. 62–63). Petitioner Coleman's sentence was the same, except that the terms of imprisonment were made cumulative, resulting in a total of three years (R. 67–69). Petitioner Steinberg was sentenced to two years' imprisonment on count 1 and one year's

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[13] With the exception of certain items which had been "identified by Shirley Kremen as her personal property and returned to her on September 25, 1953" (Appendix to petitioners' brief, p. xix).

[14] The record indicates that there was a subsequent "motion to return seized property and * * * to suppress evidence" (R. 164), which was heard (R. 164–180) and denied (R. 73) on April 13, 1954, shortly after the beginning of the trial (R. 73), but this motion, which is not contained in the record, appears to have been concerned with a search which is not here in issue, *viz.*, the search of an automobile incident to the arrest of the subsequently acquitted defendant, Patricia Blau (see fn. 2, *supra*, p. 4).

imprisonment on count 2, to run consecutively, *i. e.*, a total of three years (R. 69–71).

SUMMARY OF ARGUMENT

I

None of the search-and-seizure questions raised by petitioners should be reached. Petitioners, by carefully refraining from asserting any property interest in the items seized, failed to make a showing sufficient to raise the issue of their right to have the seized property suppressed (*United States* v. *Jeffers*, 342 U. S. 48), though they were invited by the District Court and given every opportunity to make such showing. Their piecemeal motions to suppress, made during the trial as individual items of evidence were offered, were properly denied on the additional ground of substantial non-compliance with Rule 41 (e) of the Federal Rules of Criminal Procedure, requiring that a motion to suppress be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion.

II

In any event, the search and seizure were lawful incidents to valid arrests.

A. The arrests were valid. The arrests of Thompson and petitioner Steinberg were made pursuant to outstanding warrants for their arrest. Petitioners Kremen and Coleman and the other occupant of the cabin, Ross, were lawfully arrested without warrants because the officers had probable cause to believe that

they were harboring fugitives from justice (Thompson and Steinberg) in the officers' presence, in addition to committing the felony of accessoryship after the fact to Thompson's violation of the Smith Act, likewise in their presence. With respect to the latter arrests, it was not necessary that there should have been a "likelihood of escape" (though there was in fact such likelihood here), since Congress specifically eliminated that requirement by the 1951 amendment of the pertinent statute. And it was not necessary for the officers to see the cabin's occupants performing acts which were illegal *per se* in order to have probable cause to believe them guilty of committing a felony in their presence. Nor was it necessary for the officers to exclude every hypothesis of innocence before acting.

B. The search of petitioners and of the premises was a lawful incident to the arrests.

(1) The question of the legality of the search is governed by the rationale of those cases which have upheld warrantless searches of premises within the immediate control of persons lawfully arrested, for the purpose of finding the fruits or instrumentalities of the crime. *United States* v. *Rabinowitz*, 339 U. S. 56; *Harris* v. *United States*, 331 U. S. 145. Prior to the surveillance, the officers did not have sufficient knowledge to give them the probable cause necessary to procure a search warrant. Once the fugitives, Thompson and petitioner Steinberg, were positively identified (through the surveillance) as two of the cabin's occupants, delay might have been fatal. It is not sound to argue that, after making these identi-

fications, the officers could have prevented flight or the removal or destruction of property "by guarding the premises until one of their number had obtained warrants." If the officers had sufficient information on which to arrest petitioners if they attempted to flee, they had enough information to arrest them forthwith and to search the premises incidentally thereto.

(2) The area of search was reasonable in relation to the crime observed. There is no precise mathematical test of reasonableness. Each case must be judged on its own facts and circumstances. Here, petitioners were in exclusive possession of the cabin. Their control extended not only to every room in the cabin, but also to the grounds. The search of the entire cabin and grounds was therefore reasonable and lawful under the decisions of this Court sustaining the legality of similar searches in comparable factual settings. The entire cabin itself was a prime instrumentality of the observed crime of harboring and concealing the fugitives.

(3) The search was not oppressively or abusively conducted and its thoroughness was fully warranted by the circumstances. If, as we believe, it was permissible for the officers to search the cabin, it was also permissible, since full precautions were taken to inventory the property and to safeguard it, to remove it to a convenient place for completion of the search. A minute and painstaking search was necessary since the "tools" of the particular crimes involved were not things like contraband, weapons, gambling para-

phernalia, etc., but seemingly innocent things like false identification indicia.

(4) The search was not unreasonable because of the absence of "exceptional circumstances", such as resistance to arrest, attempted flight, or efforts to remove, conceal, or destroy property. The legality of a search without warrant incident to a valid arrest depends on none of these factors. There can be little doubt, in any event, that the only reason none of these things occurred was the alertness and alacrity of the officers.

(5) The search of the "outhouse" was also proper. This had been as much under petitioners' control as the cabin itself. Since it could have been searched at the time of the arrests, the fact that it was not searched until several days later can, on principle, make no difference. Moreover, since the premises were ininhabited and petitioners were in custody at the time of the search of the outhouse, the latter search involved no invasion of petitioners' privacy in any meaningful sense. The outhouse, in any event, was beyond the curtilage of the cabin, and the sole fruit of the search, beer cans bearing petitioners' fingerprints, could not have prejudiced them, since they do not deny their presence at the cabin.

III

Petitioners' convictions are not based on unconstitutional or otherwise invalid applications of the harboring, accessoryship, and conspiracy statutes.

A. The convictions do not involve "an unconstitutional pyramiding of offenses."

1. It is not correct, as petitioners Kremen and Coleman claim, that there was at most one substantive offense because "all of the proof which established the harboring of Steinberg also established the accessory-ship after the fact to the Thompson conviction." Among other elements requiring proof under the one count but not the other was the obviously important element of the identity of the recipient of the aid and comfort—Steinberg in one count, and Thompson in the other.

2. The convictions under the conspiracy counts were not the result, as petitioners Kremen and Coleman claim, of a "splitting" into "two separate conspiracies" of "what was at most a single conspiracy." The evidence warranted the jury in concluding that there were two separate and distinct conspiracies, formed at different times and places and with different original members. Kremen and Coleman were ultimate (but not original) members of both conspiracies. One of the conspiracies involved comforting and assisting the fugitive Thompson, the other the harboring and concealing of the fugitive Steinberg. The two conspiracies became linked up when Thompson and petitioner Coleman arrived at the cabin a day or two prior to the arrests (the members of the other conspiracy having been at the cabin all summer), but this did not result in the two conspiracies' losing their identities or coalescing into one.

3. The offense charged in each of the conspiracy counts is not the same offense as that charged in the corresponding substantive count. Conspiracy to com-

mit an offense is distinct from the substantive offense which is the object of the conspiracy, and may be separately punished. It is only where the agreement of two persons is necessary for completion of the substantive crime that a conspiracy charge may not be added to the substantive charge. *Pinkerton* v. *United States,* 328 U. S. 640. This principle has no applicability here since, as petitioners concede, each of the two substantive offenses involved—accessoryship after the fact and harboring—may be committed by one person alone.

B. Receiving and assisting one who, having already been convicted of an offense against the United States, has fled from justice, in order to hinder and prevent his apprehension and punishment, constitutes, within the meaning of 18 U. S. C. 3, accessoryship after the fact to the offense of which the fugitive was convicted. The explicit language of the accessoryship statute ("* * * in order to hinder or prevent [the principal offender's] apprehension, trial or punishment * * *") requires this result, which was also the rule at common law. *Rex* v. *Burridge,* 3 P. Wms. 439, 24 Eng. Reprint 1133.

C. The element of *scienter* was clearly proven against all petitioners. *Scienter* may be, and usually is, inferred from circumstantial evidence. In the light of all the circumstances here shown, the jury was amply justified in concluding that petitioners were well aware of Thompson's and Steinberg's fugitive status.

IV

The fact that the accessoryship count at one point mistakenly referred to the principal offense (which was otherwise correctly described and identified by the sections of the Smith Act violated) as conspiracy to organize a society for "the overthrow" (rather than "advocating the overthrow") of the Government by force did not prejudice petitioners, who were clearly apprised of the nature of the charge. Any error, defect, irregularity, or variance which does not affect substantial rights is to be disregarded. Rule 52 (a), F. R. Crim. P.

ARGUMENT

I

NONE OF THE SEARCH-AND-SEIZURE QUESTIONS RAISED BY PETITIONERS SHOULD BE REACHED. PETITIONERS UTTERLY FAILED TO MAKE A SHOWING SUFFICIENT TO RAISE THE ISSUE OF THEIR RIGHT TO HAVE THE SEIZED PROPERTY SUPPRESSED, THOUGH INVITED BY THE DISTRICT COURT AND GIVEN EVERY OPPORTUNITY TO MAKE SUCH SHOWING

In *United States* v. *Jeffers*, 342 U. S. 48, this Court held that the owner of property which had been unlawfully seized was entitled to have the same suppressed for use in evidence against him even though he had no proprietary or leasehold interest in the premises from which the goods were seized (a hotel room occupied by the defendant's aunts), at least where he had received from the lawful occupants of the premises the right of free access thereto. We

shall assume that, under the rationale of *Jeffers*, each of the petitioners had standing to object to any unlawful seizure from the premises here in question of any property owned by him, even though petitioner Kremen alone had a proprietary interest (that of lessee) in the cabin (*supra*, pp. 6, 13).

No petitioner, however, had standing to object to the seizure from the premises of any property *not* owned by him. See *Jeffers*, *supra*, at 54; *Wilson* v. *United States*, 218 F. 2d 754, 756 (C. A. 10), and cases cited; *Steeber* v. *United States*, 198 F. 2d 615, 617 (C. A. 10); *United States* v. *Eversole*, 209 F. 2d 766 (C. A. 7); *Scoggins* v. *United States*, 202 F. 2d 211 (C. A. D. C.); *Gaskins* v. *United States*, 218 F. 2d 47 (C. A. D. C.); cf. *Agnello* v. *United States*, 269 U. S. 20, 35; *Goldstein* v. *United States*, 316 U. S. 114, 121. In this case, none of the petitioners made claim to the ownership of any of articles seized at the cabin which were introduced in evidence (see *supra*, pp. 11–14). In fact, the record reflects that each has carefully refrained from asserting any property interest in the items seized. The District Court, in denying petitioners' motion of February 4, 1954, for return of the seized property (*supra*, pp. 11–12), explicitly based its order of denial on the fact that none of the moving parties (which included petitioners) had asserted any property interest in any of the items (*supra*, p. 12). The court invited the movants to remedy this fundamental defect (for which purpose it directed the Government to produce its list of the items involved) and to renew the motion upon a proper showing (*supra*, pp. 12–13). But petitioners have eschewed this course,

and the defect has never been remedied (see *supra*, pp. 13–14). In these circumstances, the denial of the February 4 motion, as well as of petitioners' subsequent piecemeal motions to suppress, made during the trial as items of evidence were offered (*supra*, p. 14), was clearly correct.

Furthermore, apart from the fact of petitioners' failure to lay claim to ownership of any of the seized properties, their piecemeal motions to suppress were properly denied for failure to comply with Rule 41 (e) of the Federal Rules of Criminal Procedure. That rule provides:

> (e) *Motion for Return of Property and to Suppress Evidence.*
>
> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant * * *. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. * * * *The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion,* but the court in its discretion may entertain the motion at the trial or hearing. [Emphasis added.]

It is evident here that there was ample opportunity for petitioners to have filed proper motions to suppress before the trial, and that petitioners were well

aware, at such time, of whatever grounds may have existed for such motions. Their failure to file such proper pre-trial motions, therefore, amounted to substantial non-compliance with Rule 41 (e), and, for this reason alone, warranted the trial court in refusing to hear the piecemeal motions as they were made during the trial.[15]

II

IN ANY EVENT, THE SEARCH AND SEIZURE WERE LAWFUL INCIDENTS TO VALID ARRESTS

Assuming that petitioners have standing to challenge the legality of the search and seizure in question (but see *supra*, pp. 21–24), their contention (Br. 27–57) that the search and seizure were unlawful cannot be sustained. The search and seizure were lawful incidents to valid arrests.

A. THE ARRESTS WERE VALID

Petitioners Kremen and Coleman argue (Br. 26–37) that their arrests were invalid [16] because the officers did not have sufficient cause for believing that

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[15] The record does not reflect the ground on which these motions were denied. It simply indicates that each was denied. In view of the ground on which the pre-trial motion was denied, however (*supra*, p. 12), it can reasonably be assumed that the petitioners' failure to comply with Rule 41 (e) by making adequate pre-trial motions was in part, at least, the basis of the court's denial of their motions made during the trial.

[16] The arrest of Steinberg was made pursuant to a valid bench warrant issued for his arrest in New York on June 20, 1951 (R. 900, 901), and is not in issue here.

these petitioners were committing a felony in their presence to justify an arrest without warrants.[17]

Arrests without warrant for crimes which the arresting officers have probable cause to believe are being committed in their presence are frequently made by law enforcement officers. Innumerable decisions of this Court and of the lower federal courts have passed upon the validity of such arrests. As this Court has frequently observed, there is no precise formula for determining the existence of probable cause. The validity of any such arrest must be determined solely by its reasonableness in the light of the facts and circumstances of the particular case. *United States* v. *Rabinowitz,* 339 U. S. 56, 60.

The general criteria are well settled. The accepted definitions of probable cause are those adopted by this

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[17] In support of their claim (Br. 18) that the agents had time to procure warrants, petitioners assert the preparations began at least 72 hours before the raid (Br. 18). They point out that two agents who participated in the raid and were acquainted with Thompson and petitioner Steinberg arrived in San Francisco two days before the raid (*ibid.;* R. 352, 438). Petitioners do not and cannot challenge the arrest of Thompson and Steinberg because warrants were outstanding for their arrest. The agents were not required (see Br. 26, fn. 27) to have the warrants in their possession. Rule 4 (c) (3), F. R. Crim. Proc. So far as petitioners Kremen and Coleman are concerned, it is apparent from the record that the agents did not know their identity until after their arrest (R. 273–274). (They were not certain of the identities of even Thompson and Steinberg until thirty minutes prior to the arrests (*supra,* p. 8).) It is doubtful, therefore, whether the agents could have described Kremen and Coleman with the degree of "reasonable certainty" required to obtain a warrant. Rule 4 (b) (1), F. R. Crim. Proc.; see *West* v. *Cabell,* 153 U. S. 78.

Court, many years ago, in *Stacey* v. *Emery*, 97 U. S. 642, 645:

> * * * A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged.
>
> * * * Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty. * * *

In *Brinegar* v. *United States*, 338 U. S. 160, 172–176, this Court emphasized that probable cause is a matter of probabilities; that the standard of proof required for probable cause is far less stringent than that required to establish guilt; and that nothing more is required to justify an arrest than that the circumstances known to the officers, by personal observation or by information, be such as would justify a man of reasonable caution in the belief that a felony is being committed. The ultimate question becomes, therefore: Were the facts and circumstances within the knowledge of the arresting officers sufficient in themselves to warrant a man of reasonable caution in the belief that a felony had been committed or was being committed in his presence?

An agent of the FBI may lawfully arrest without a warrant any person who commits *any* offense against the United States in his presence. He may also arrest without a warrant for any federal felony if he has reasonable grounds to believe that the person to be arrested "is committing such felony." 18 U. S. C. 3052

(*supra*, pp. 3–4). Petitioners' complaint (Br. 29, 35) that another element—the likelihood of escape—is necessary to allow an agent of the FBI to arrest for a crime committed in his presence is without merit. While this may have been required prior to January 1951, it certainly has not been a requirement since that date. Congress amended the former statute for the express purpose of eliminating "the likelihood of * * * escap[e]" requirement, because it could see no valid reason why FBI agents should not have at least the same authority as marshals and their deputies to make arrests without warrant and because it desired to free FBI agents of the restrictions imposed by the decision in *United States* v. *Coplon*, 185 F. 2d 629 (C. A. 2), certiorari denied, 342 U. S. 920 (Br. 56). See Sen. Rep. No. 2464, 81st Cong., 2d sess., and H. Rep. No. 3228, 81st Cong., 2d sess., both on S. 3945; 96 Cong. Rec. 14660, 16934. There is therefore no need to consider the elements necessary to permit a private person in California to arrest without a warrant, or whether the element of "likelihood of escape" by petitioners was here present.[18]

Applying these principles to the facts here presented, we submit that, as a matter of law, the arrests without warrant of petitioners Kremen and Coleman

[18] The facts, however, that two of the cabin's occupants were fugitives from justice who had materially altered their appearances and had avoided apprehension for over two years, that the other occupants appeared to be harboring these fugitives, and that two automobiles were present near the cabin would suffice, we think, if the "likelihood of escape" element were relevant, to establish its presence here.

were quite as valid as the arrests (under warrants) of Thompson and petitioner Steinberg. As already noted, the agents were not positive that Thompson and Steinberg were among those at the cabin until thirty minutes before the arrests (R. 197). Until these fugitives had been identified, the agents did not have probable cause to make any arrest. Once the fugitives were identified, there was certainly probable cause to believe that a federal crime was being committed in the very presence of the agents.[19] Since Thompson and petitioner Steinberg had successfully evaded apprehension for more than two years, despite intensive efforts by the FBI to locate them, and there were two automobiles near the cabin that could be used by those present to escape, the agents would have been derelict in their duty if they had delayed in making the arrests. Thompson and Steinberg were arrested together with "others there that it can be said could be part of the harboring process" (R. 111). In the circumstances facing them, the agents cannot reasonably be said to have been required to travel from remote Twain Harte in the Sierra Nevada mountains to the nearest United States Commissioner or District Judge, and back again (a total distance of at least 120 miles), before making the arrests.

Equally without merit is petitioners' contention (Br. 27) that, since the agents did not witness them performing acts which were illegal *per se*, the agents had no probable cause to believe a felony had been

[19] Both harboring and accessoryship after the fact are "offenses against the United States"; indeed, accessoryship after the fact to a violation of the Smith Act is a felony.

or was being committed. It is naive to say that, to give aid and comfort to a fugitive from justice, one must commit acts in themselves criminal. An indispensable condition of successful commission of the crime of accessoryship after the fact to Thompson's offense by aiding and harboring him was that the aiding and harboring activities should appear innocent to a casual observer.

Similarly untenable is the argument (Br. 34–35) that the arrests of petitioners Kremen and Coleman were unlawful because the arresting officers had not witnessed anything, prior to the arrests, that would cause them to believe that these petitioners had the "*scienter* or mental state" required for the crime for which they were arrested. Obviously an arresting officer need not probe the "mental state" of the suspect before acting. Such a requirement would virtually destroy the power to effect a summary arrest and defeat the purpose which underlies the power. Accordingly, all that has ever been required is that what appears to be a crime be committed in the presence of the officer; in other words, that the officer have reasonable cause to believe, in the light of all the attendant circumstances, that a felony is *probably* being committed in his presence. From their own observations, the agents here certainly had good reason to believe petitioners were receiving, relieving, comforting, and assisting fugitives from justice. Indeed, petitioner Kremen was seen administering to the care and comfort of the occupants of the cabin (R. 193–194).

That petitioners might conceivably have been with the fugitives for some legitimate or innocent reason was not the determining criterion of the legality of the arrests. It is not necessary to exclude every hypothesis of innocence in determining whether probable cause sufficient to arrest without a warrant exists. *United States* v. *Bianco*, 189 F. 2d 716, 720 (C. A. 3).[20] The question is whether the inference which the agents drew was a *reasonable* one. In the light of the knowledge which the agents had obtained by personal observation of the cabin, they were bound to conclude that there was at least a high degree of *probability* that petitioners were accessories after the fact to Thompson's offense, especially since one of them (Steinberg) was himself a fugitive from justice charged in an outstanding indictment as a co-conspirator of Thompson. Petitioners' arguments overlook the fact that the reasonable or probable cause "necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial." *United States* v. *Heitner*, 149 F. 2d 105, 106, (C. A. 2).[21]

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[20] In *Brinegar*, *supra*, 338 U. S. 160, the circumstances which presented themselves to the arresting officers at the time of the arrests did not exclude every hypothesis consistent with innocence. Driving along a highway is an innocent act in and of itself; it does not necessarily follow that one who broke the law once would do it again; and it was quite possible that the automobile was weighted down by something innocent rather than by illegal liquor.

[21] The case of *Fulbright* v. *United States*, 91 F. 2d 210 (C. A. 8), relied upon by petitioners (Br. 34), is inapplicable because that case, while involving the crime of accessoryship after the fact, did not involve the issue of probable cause necessary to sustain an arrest without a warrant. In *United States* v. *Di Re*, 332 U. S.

B. THE SEARCH OF PETITIONERS AND OF THE PREMISES WAS A LAWFUL INCIDENT TO LAWFUL ARRESTS

Petitioners assail the search because it was made without a warrant and because it was incident to allegedly invalid arrests (Br. 37–57). They further argue that, even if the arrests were valid, the search, for various reasons, was so unreasonable as to be violative of the Fourth Amendment. We urge, on the contrary, that the search was incidental to lawful arrests and that it was a valid and reasonable exercise of the officers' authority.

(1) To petitioners' contention that a search warrant should have been obtained before surveillance of the cabin began, the short answer is that the agents did not have sufficient knowledge prior to the surveillance to give them the "probable cause" necessary to procure a search warrant. Until positive identification of Thompson and petitioner Steinberg had been made, the agents had no adequate basis for obtaining one. Once the identification had been made, delay might well have been fatal (*supra*, p. 28). To contend, on the other hand, as petitioners also do (Br. 56), that, when identification had been made, the agents could have prevented flight or the removal or destruction of property "by guarding the premises until one of their number had obtained warrants"

581, also relied on by petitioners, Br. 28, 29, 35); the crime involved the selling of gas ration coupons, an act illegal *per se*. As we have pointed out (*supra*, pp. 28–29), the acts of giving aid and comfort which constitute accessoryship after the fact (and harboring) need not be illegal *per se*; they are illegal because the person assisted has been convicted of or has committed a crime.

is to beg the question. If the officers had sufficient information on which to arrest petitioners if they attempted to flee, they had enough information to arrest them forthwith (see *supra*, pp. 24–30) and to search the premises as an incident thereto. This Court, in *United States* v. *Rabinowitz*, 339 U. S. 56, 65, laid down the following rule:

> A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. *Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.* [Emphasis added.]
>
> * * * The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. * * *

The *Rabinowitz* decision expressly overruled *Trupiano* v. *United States*, 334 U. S. 699, to the extent that the latter decision made the legality of a warrantless search depend "solely upon the basis of the practicability of procuring [a warrant] rather than upon the reasonableness of the search after a lawful arrest * * *" (339 U. S. at 66).

As we have already pointed out, there can be no question as to the validity of the arrests of Thompson and petitioner Steinberg, both of whom were arrested pursuant to valid warrants outstanding in the Southern District of New York. Nor can there be any question but that the crime of harboring was being committed in the presence of the FBI agents and that they also had probable cause to believe that all three petitioners were committing, in their presence, the felony of accessoryship after the fact to Thompson's violation of the Smith Act (see *supra*, pp. 27–30). As Judge Lemmon observed, in the principal affirming opinion in the Court of Appeals (R. 968–973), the search here falls within the rationale of those cases which have upheld a search without warrant of premises within the immediate control of a person legally arrested, for the purpose of finding the fruit of the crime or the instrumentalities through which it was carried out. *United States* v. *Rabinowitz*, 339 U. S. 56; *Harris* v. *United States*, 331 U. S. 145; *Marron* v. *United States*, 275 U. S. 192; *Agnello* v. *United States*, 269 U. S. 20, 30. The agents entered upon the premises because warrants were outstanding for the arrests of Thompson and petitioner Steinberg, and because their observation disclosed the probable commission by all petitioners of a felony in their presence. The agents

arrested Ross, Thompson, and the three petitioners. Thompson and petitioner Steinberg were arrested just outside the cabin. Ross and petitioners Kremen and Coleman were arrested inside the cabin. Immediately thereafter, as an incident to the lawful arrests of all five of these individuals (and certainly of the three arrested in the cabin), the agents searched the cabin for the purpose of finding "anything that would be a fruit of the crime or a part of the crime" (R. 107).

(2) Contrary to petitioners' assertions, the area of search was reasonable in relation to the crime observed, and therefore valid. There is no precise mathematical test of reasonableness. "Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Company* v. *United States*, 282 U. S. 344, 357. Petitioners were in exclusive possession of the cabin. Their control extended not only to every room in the cabin, but also to the grounds. The fact that the cabin was rented does not distinguish this case from the other cases where searches of the immediate area have been upheld as incidents of valid arrests. In *Agnello* v. *United States*, 269 U. S. 20, the right of arresting officers "to search the place where the arrest is made" was held not to permit a search "several blocks distant from Alba's house, where the arrest was made" (*id.*, pp. 30–31), but it was held to justify the entry into and search of Alba's house, in which the officers, who had been watching through the windows, had observed an illicit

transaction in drugs.[22] In *Marron* v. *United States*, 275 U. S. 192, 199, upholding a search contemporaneous with a valid arrest for a crime committed in the presence of the arresting officers, this Court stated that the authority of the officers "to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose." In *Harris* v. *United States*, 331 U. S. 145, this Court again sustained the authority of arresting officers to search beyond the immediate place of arrest and to explore those places within the control of the person arrested, even in a situation where no crime was being committed in the presence of the arresting officers and where the only fruit of the five-hour search of the four-room apartment was evidence of an offense other than the crime for which the defendant had been apprehended.[23] See also *Matthews* v. *Correa*, 135 F. 2d 534 (C. A. 2). And even more recently, in *United States* v. *Rabinowitz*, 339 U. S. 56, which, to be sure, involved only a search of a one-room office, this Court cited with approval the *Agnello*,

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[22] The record of that case shows that the search involved four rooms; the agents entered through the kitchen, and found the packages of narcotics on the table in the dining room, where the men were arrested, and in one bedroom. One agent testified that he "searched all around the place." (Record, No. 6, O. T. 1925, pp. 62, 129, 219.)

[23] In *Harris* (331 U. S. at 152, fn. 16), this Court cited with approval *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. A. 2), certiorari denied, 323 U. S. 761. There, Judge Clark, speaking for a unanimous court, and after reviewing the leading cases, said (*id.* at 832): "The better view as to area is that the search can cover that part of the premises over which the offender's control and unlawful activities likely extended."

Marron, and *Harris* cases. Again, the Court noted that there is no fixed formula of reasonableness in such situations; that the facts of each particular case are for the trial court to evaluate in their totality (*id.* at 63).[24]

In the context of one case, it might be that the area of permissible search would not extend from the room of arrest to the next room; in another, the facts might justify a more extensive search than the four-room search involved in the *Harris* case (see 331 U. S. at 152). Certainly, the reasonableness of a search cannot be determined solely on the basis of the square footage of the area, or the fortuitous circumstance that the arrest may have been made in the doorway or the living room rather than a few feet away in the front yard. What is more important is whether the part of the premises searched was within the control of the person or persons arrested, and whether such area was being used for the unlawful purpose for which the accused was arrested.

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[24] This Court, in *Rabinowitz*, cited several factors which justified the conclusion of the District Court that the search and seizure had been reasonable in that factual setting (339 U. S. at 64). Petitioners suggest (Br. 49) that this case should be evaluated in relation to those factors alone. Their suggestion, however, is not sustained by the *Rabinowitz* opinion. In one respect the instant facts are even stronger than in *Rabinowitz*. Here a felony was being committed in the immediate presence of the arresting officers, whereas in *Rabinowitz* the facts showing probable cause to justify the issuance of the arrest warrants and the incidental search without search-warrant of the business premises had been gleaned over a week before the arrest. This same distinction might be made as regards the *Harris* case, involving a search of private premises.

Marron v. *United States, supra,* 275 U. S. at 199. In an analagous situation, where a defendant was apprehended about a hundred feet away from a barn which was reasonably believed by federal officers to be used as a distillery, the Court of Appeals for the Eighth Circuit, in sustaining the subsequent search of the barn, stated (*Kelley* v. *United States,* 61 F. 2d 843, 847):

> It is contended there was no right to search the barn, it not being the place of arrest, and counsel relies on Agnello v. United States, supra, where the court speaks of the right without a search warrant contemporaneously to search persons lawfully arrested "while committing crime and to search the place where the arrest is made," etc., and counsel argues that the right does not extend to other than the immediate place of arrest. In the Agnello case, Agnello's house, which was the subject of the search, was several blocks distant from the place where the arrest was made, and when it was entered the conspiracy had terminated and defendants were under arrest and custody elsewhere. Surely the place of search is not the mere spot upon which a defendant stands when he is arrested. It would seem rather an affront to common sense to say that were officers on the outside of a building where a murder was being committed, heard shots and screams from within, observed a person running from the door with a smoking revolver in his hands, and they pursued him and arrested him within a hundred feet of the building where the crime was committed and from which he had fled, that they

could not search the building, but must be content with looking over the spot where the arrest actually took place.

The word "place" as used by the Supreme Court in the Agnello case certainly should be given no such narrow meaning as counsel seeks to give it here. The barn was in the immediate vicinity of the place where the arrest was made.

In the instant case, involving the offense of harboring and concealing fugitives, it was proper for the officers to search "all parts of the premises used for the unlawful purpose" (*Marron* v. *United States*, 275 U. S. 192, 199), since the entire cabin was itself a prime instrumentality of the crime.

(3) The search was not oppressively or abusively conducted and its comprehensive thoroughness was fully warranted by the circumstances.

Agent Whelan testified that petitioners were taken to the cabin and were allowed to pick up their clothes and anything else they desired (R. 102). They were also advised that if there was any property in the vicinity, inside or outside, of "a valuable nature or personal nature, since the place was located in the woods as it was, that if they would make it known we would locate it and try to safeguard it in some way" (R. 102).[25] Agents also remained at the prem-

[25] Petitioners introduced in evidence defendants' Exhibit A, a list of property which was taken by the FBI at the cabin. A portion of this property was returned to petitioner Kremen on September 25, 1953, according to the list (Appendix to Petitioners' Brief, pp. xix–xxiv). Petitioners did not identify any of the property in the cabin as belonging to any of them with the exception above noted. See *supra*, pp. 11–14.

ises until midnight to guard the premises from intruders (R. 392–393).

Petitioners state (Br. 40) that it was unreasonable for the agents to transfer the bulk of the cabin's contents to their San Francisco headquarters, instead of completing the search at the scene. But if, as we believe, it was permissible for the agents to search the cabin, it was also permissible, since full precautions were taken to inventory the property and to safeguard it, to remove it to a convenient place for completion of the search. Petitioners are unable to point to any prejudice which resulted from the fact that the agents completed their search, necessarily time-consuming and painstaking, at their San Francisco headquarters, rather than at the remote hideaway in the Sierra Nevada mountains.

The type of crime involved here, it should be emphasized, does not entail contraband, weapons, gambling paraphernalia, illicit liquor or things of like order. This is the kind of crime which singularly depends for its success upon the maintenance of an innocuous appearance. Thus, it involved here the use of seemingly innocent indicia of identification (serving to establish and give credence to false identities), notes making arrangements for meetings, the transmission of instructions in cryptic form, etc. In the very nature of things, it was necessary, in order to uncover the "tools" of the crime, to make a minute and painstaking search.

The fruits of the search which were introduced in evidence and are now pertinent[26] were some identification cards (G. Ex. 23), a social security card (G. Ex. 24), and a fishing license (G. Ex. 25), all in the name of "Joshua Newburg" (Steinberg); the wallets, and their contents, of petitioner Steinberg, Ross, and petitioner Coleman, with false identifying documents in the names of "Newberg", "Newman", and "Gordon", respectively (G. Exs. 82, 83, 90, and 91); and the contents of petitioner Kremen's purse, which included her false identification papers (G. Ex. 86). Thus, generally speaking, the only seized documents which were introduced were false identity papers which were used to safeguard Thompson and Steinberg from any risk that petitioners' true names would lead to the arrest of the fugitives and certain notes in the possession of Ross, who is not a petitioner. The false identification documents taken

[26] Government Exhibits 8–13, inclusive, had to do with the defendant Patricia Blau, who was acquitted. Government Exhibits 21 and 22 were some identification cards and a library card of the defendant Ross (under the name of "Newman"), who is not a party hereto. Government Exhibits 93 and 94 (a birth certificate and a union book) were secured from Thompson who likewise is not a party hereto. Government Exhibit 105 was not secured from the cabin, but was a public record of the state of Missouri (R. 541–542). Government Exhibit 92 was a box containing ten beer cans, found in the "outhouse", as to which see *infra*, pp. 42–43. Government Exhibits 111 and 112 were records of the real estate agent Morrow (see *supra*, p. 6) and were not secured at the cabin (R. 622–625). The remainder of the exhibits (exclusive of those referred to in the text following) were taken from petitioners' persons. A different rule has always applied to the search of the person of one arrested from that applicable to the search of premises. See *Weeks* v. *United States*, 232 U. S. 383.

during the search bear the same relation to petitioners' crimes as did the burglar tools, gambling paraphernalia, and illicit liquor to the crimes involved in the cases accepted as correct by petitioners. They were instrumentalities through which the crimes were carried out.[27]

(4) Petitioners also contend (Br. 52–57) that the search in this case was unreasonable because there were no "exceptional circumstances" present to justify a search without a warrant. They argue "that there was no show of violence by petitioners, no resistance to the arrest, no attempted flight, and no effort to remove, conceal or destroy property" (Br. 55). Under the decisions of this Court to which we have referred, however (*supra*, pp. 32–38), the legality of a search without warrant incident to a valid arrest does not depend on any of these factors. Moreover, the presence of two fugitives who had materially altered their appearances and the use of fabricated identities indicate that petitioners were not above fleeing or destroying and concealing property if given an opportunity to do so. There can be little doubt that the only reason that none of these things occurred was the alertness and alacrity of the agents in making the raid. The record, indeed, shows that petitioners' alleged co-conspirator Blau, who was acquitted by the court at the end of the Government's case (R. 912),

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[27] Certainly, papers, *per se*, as distinguished from other forms of property, have no special standing rendering them immune from search and seizure. Cf. *Gouled* v. *United States*, 255 U. S. 298, 309.

destroyed certain materials just prior to her apprehension (R. 733, 737, 751, 770; G. Ex. 116).

The situation here was entirely different from those involved in *Go-Bart Importing Co.* v. *United States*, 292 U. S. 344, and *United States* v. *Lefkowitz*, 285 U. S. 452, relied upon by petitioners (Br. 42, 48, 51). The Court found there that law enforcement agents had entered the premises ostensibly for the purpose of making an arrest, but in reality for the purpose of making a general exploratory search for evidentiary materials to connect the accused with some crime. The other cases relied upon by petitioners (Br. 35, 37, 42, 44, 53, 54, 56)—*United States* v *Di Re*, 332 U. S. 581 (officers had no suspicion a crime was being committed until *after* the search); *McDonald* v. *United States*, 335 U. S. 451 (defendant under surveillance for over two months)—are plainly distinguishable.

(5) Petitioners argue, finally (Br. 46, 55), that, whatever may be said of the search of the cabin proper, it was unlawful for the agents to search the cabin's "outhouse," several days following the arrests of petitioners. This outhouse, however, was as much under the control of petitioners as the cabin itself. And the fact that the search occurred several days after the arrests can, on principle, make no difference if it was proper to search it at the time of the arrests. This is especially true in view of the fact that, at the time of the search of the outhouse, the premises were completely uninhabited, all of petitioners' possessions had been removed from the

scene, and petitioners themselves were in custody. There was thus no invasion of petitioners' privacy in any meaningful sense of the term. Moreover, the outhouse was "[a]bout twenty feet in the rear of the cabin" and served no other purpose than to "house the garbage can" (R. 385).[28] It was thus outside the curtilage of the cabin. The protection of the Fourth Amendment does not apply to buildings thus detached from the residential structure. *Carney* v. *United States,* 163 F. 2d 784, 786 (C. A. 9), and cases cited. In any event, the sole fruit of the search of the outhouse was ten beer cans on which petitioners' fingerprints were found (G. Ex. 92). Since petitioners do not deny their presence and the presence of Thompson at the cabin, it is clear that this evidence could nowise have prejudiced them.

III

PETITIONERS' CONVICTIONS ARE NOT BASED ON UNCONSTITUTIONAL OR OTHERWISE INVALID APPLICATIONS OF THE HARBORING, ACCESSORYSHIP, AND CONSPIRACY STATUTES

Petitioners contend (Br. 58–78) that the harboring (18 U. S. C. 1071), accessoryship after the fact (18 U. S. C. 3), and conspiracy (18 U. S. C. 371) provisions of the Criminal Code, under which the several counts of the indictment were laid, were unconstitutionally or otherwise invalidly applied to them in several different ways.

[28] It had once been "a toilet", but "wasn't being used at the present time" for that purpose (R. 385).

A. PETITIONERS' CONVICTIONS DO NOT INVOLVE "AN UNCONSTITUTIONAL PYRAMIDING OF OFFENSES"

First, petitioners argue (Br. 58–65) they "were placed in double jeopardy by an unconstitutional pyramiding of offenses" (Br. 58). They contend that this took three forms. We shall examine the arguments in the order of their presentation.

1. *It is not correct, as petitioners claim, that there was at most one substantive offense because "all of the proof which established the harboring of Steinberg also established the accessoryship after the fact to the Thompson conviction"*

Petitioners Kremen and Coleman argue (Br. 60–62) that their conviction "on both the accessoryship and harboring counts" is invalid because, they say, "all of the proof which established the harboring of Steinberg [count 3] also established the accessoryship after the fact to the Thompson conviction [count 1.] Neither offense required the proof of any fact not essential to the other" (Br. 60).[29] However, since petitioner Kremen's sentence on the harboring count was made to run concurrently with her sentence on the accessoryship count (*supra*, p. 14), this argument is not helpful to her. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1. In any event, it is without merit.

Petitioners concede (Br. 60), as they must, that a single act or series of acts may supply the basis for conviction of two or more separate offenses, "so

[29] Since petitioner Steinberg was not charged in the harboring count (he being the allegedly harbored person), this argument is not available to and is not made by him (Br. 60, 63).

long as each requires the proof of a fact not essential to the other." *Pereira* v. *United States*, 347 U. S. 1, 9; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Blockburger* v. *United States*, 284 U. S. 299, 304. This test is clearly met in the instant case. In the first place, the recipient of the "comfort and assist[ance]" which the first, or accessoryship, count charged the defendants named in that count with having rendered, namely, Robert G. Thompson, was a different person from the individual whom the third, or harboring, count charged the defendants named in that count with having "harbor[ed] and conceal[ed]," namely, (petitioner) Sidney Steinberg. It was thus incumbent on the Government to prove under each count a fact—and an obviously important fact—which it was not required to prove under the other.

Furthermore, while the difference in the identity of the recipient of the aid and comfort alleged in the two counts is doubtless the most important of the elements requiring proof under the one count but not the other, it is by no means the sole such element. Under the first, or accessoryship, count, which was based upon 18 U. S. C. 3, it was necessary for the Government to prove (1) that Thompson had been convicted in the United States District Court for the Southern District of New York for violation of the Smith Act; (2) that the defendants named in the count knew of this conviction; (3) that, with this knowledge, they received, comforted, and assisted Thompson; and (4) that their purpose in doing so was to prevent Thompson's apprehension

and punishment (R. 3–4). None of these elements was required to be proved under the third, or harboring, count. Under the latter count, which was based upon 18 U. S. C. 1071,[30] it was necessary for the Government to prove (1) that a warrant had been issued by the United States District Court for the Southern District of New York for the arrest of Steinberg; (2) that the defendants named in the count had notice and knowledge of this fact; (3) that with this knowledge, they harbored and concealed Steinberg; and (4) that their purpose in doing so was to prevent Steinberg's discovery and arrest (R. 6). None of these elements was required to be proved under the first, or accessoryship, count.

Bell v. *United States*, 349 U. S. 81, cited by petitioners (Br. 62), gives no support to their argument. Bell was convicted of violation of the White Slave Act on two counts. Each count involved the same transportation at the same time and place, the difference being that a different woman was named in each count as the person transported. The Government contended that Bell had committed two separate

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[30] Petitioners' interpretation (Br. 58–59, fn. 48) of the legislative history of the August 20, 1954, amendment to this statute is unfounded. The purpose of this legislation was "to create an adequate statutory deterrent for persons who are inclined to conceal fugitives from justice" (Sen. Rep. No. 2141, 83rd Cong., 2d sess.; H. Rep. No. 1928, 83rd Cong., 2d sess.). The reports, citing this very case, informed Congress that these petitioners were to be tried as accessories after the fact in addition to harboring. The only intent of Congress, so far as can be determined, was to increase the penalties of the harboring statute. There is nothing which indicates a belief on the part of Congress that the harboring statute is the only statute applicable to this case.

and distinct offenses, as the statute prohibited the transportation of *any* woman in interstate commerce for immoral purposes. The Court, holding that the gist of the offense was the act of transportation itself, decided that, since there had been but one such act, only one offense had been committed. The basis of this decision was the ambiguity within the statute itself, which was resolved "against turning a single transaction into multiple offenses." (349 U. S. at 84).[31] For the reasons stated *supra*, pp. 44–46, the case at bar is clearly distinguishable.

United States v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, and *Short* v. *United States*, 91 F. 2d 614 (C. A. 4), also relied on by petitioners (Br. 62), are equally inapposite. In the *Universal C. I. T. Credit Corp.* case, the Court decided, after a careful study of the legislative history of the statute involved, that Congress sought to punish a *course of conduct* rather than each individual violation of the Act. In *Short*, the court, finding that one of the defendants had previously been convicted in another jurisdiction of a conspiracy that encompassed the conspiracy for which he was being tried in the case before the court, held that he had for that reason been placed in double jeopardy by the later prosecution.

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[31] See also *Robinson* v. *United States*, 143 F. 2d 276 (C. A. 10). Cf. *Oddo* v. *United States*, 171 F. 2d 854 (C. A. 2); *Ladner* v. *United States*, 230 F. 2d 726 (C. A. 5), pending on writ of certiorari, No. 568, this term; *Piquett* v. *United States*, 81 F. 2d 75, 80 (C. A. 7), certiorari denied, 298 U. S. 664.

2. *The convictions under the conspiracy counts were not the result, as petitioners claim, of a "splitting" into "two separate conspiracies" of "what was at most a single conspiracy"*

Petitioners Kremen and Coleman next contend (Br. 62–63) that "[i]n addition to splitting up into two substantive offenses what was at most the single crime of harboring, the government also split what was at most a single conspiracy into two separate conspiracies" (Br. 62). "There was no evidence whatsoever," they argue, "to show any agreement to aid Steinberg separate and apart from an agreement to aid Thompson, or *vice versa*" (*ibid.*).[32]

Here again, as in the case of the preceding argument (see *supra*, p. 44), it is to be observed preliminarily that, since petitioner Kremen's sentences on the two conspiracy counts were made to run concurrently (*supra*, p. 14), this argument is not helpful to her. In any event, the contention has no more merit than the previous contention, *i. e.*, that only one substantive offense was proved.

A conspiracy is an agreement between two or more persons to accomplish a criminal act or acts by concerted action. The test of whether there is a single conspiracy or multiple conspiracies is the number of agreements entered into between the conspirators and whether their activities have a single or multiple objectives. *United States* v. *Rosenberg*, 195 F.

[32] Since petitioner Steinberg was charged in only one of the conspiracy counts (count 2), this argument, like the preceding argument (see fn. 29, *supra*, p. 44), is not available to and is not made by him (Br. 62, 63).

2d 583, 600–601 (C. A. 2), certiorari denied, 344 U. S. 838; *United States* v. *Speed*, 78 F. Supp. 366, 368–369 (D. D. C.). Of course, it is well settled that the agreement or agreements need not be express, but may be inferred from the circumstances shown. *United States* v. *Glasser*, 116 F. 2d 690, 699 (C. A. 7), modified on other grounds, 315 U. S. 60; *Nilva* v. *United States*, 212 F. 2d 115, 121 (C. A. 8), certiorari denied, 348 U. S. 825; *Oliver* v. *United States*, 121 F. 2d 245, 249 (C. A. 10), certiorari denied, 314 U. S. 666; *United States* v. *Georga*, 210 F. 2d 45, 48 (C. A. 3). It is similarly clear that new persons may join an existing conspiracy and that this is not deemed to terminate the original conspiracy and to replace it with another so long as the original objective remains unchanged. *Skelly* v. *United States*, 76 F. 2d 483, 489 (C. A. 10), certiorari denied, 295 U. S. 757.

The evidence at bar warranted the jury in concluding that there were two separate and distinct conspiracies, just as there were two separate and distinct substantive offenses (see *supra*, pp. 44–46), and that petitioners Kremen and Coleman were members of both, each having become a party thereto at different times.

So far as the record shows, there was originally no direct connection between the count-2 conspiracy—that involving the rendering of comfort and assistance to the fugitive Thompson—and the count-4 conspiracy, involving the harboring and concealing of petitioner Steinberg. In fact, the evidence tends affirmatively to establish that the two conspiracies first

became linked less than a week prior to the arrests at the Twain Harte cabin.

The earliest overt acts of the conspiracy to aid Thompson, the record shows, occurred in Missouri, where Thompson and Coleman, together with two other persons, spent the 1953 Decoration Day weekend in a motel adjacent to a fishing resort (R. 566–569, 574–575; G. Ex. 107). The next act of this "Thompson" group took place in St. Louis, Missouri, where Coleman purchased a new car on June 5, 1953, for their further travels (R. 548). After the purchase of this car, the record is silent as to the travels of the "Thompson" group until the Fourth of July weekend, when Thompson and Coleman, again with their two companions, returned to Camdenton, Missouri, in their new car, for another weekend of fishing and boating (R. 570–571, 575–577; G. Ex. 108).[38] The "Thompson" group—Thompson, Coleman, and two others—next appeared, on August 10, 1953, in Bigfork, Montana, where Thompson obtained a fishing license under his pseudonym, "J. F. Brennan" (R. 596). The group then spent a full week in Polson, Montana, a

[38] The testimony of Mrs. Dorothy Henrichsen (R. 700–715) tends to place Thompson in Twain Harte in the latter part of June or early part of July, 1953. It is almost certain, however, from the evidence as a whole, particularly that being reviewed in the text at this point, that this witness was mistaken as to the identity of the individual (identified by her as Thompson) whom she saw in her store with petitioners Kremen and Steinberg on the occasion about which she testified. The jury, after some deliberation, returned to the court and rechecked the dates of Mrs. Henrichsen's testimony together with the dates given by Mr. Donner, the Camdenton motel-operator, before rendering its verdict (R. 929–932).

fishing resort, vacating the cabins there on August 17, 1953 (R. 600–601). Three days later, on August 20th, the group's new car, with four passengers, entered the State of California from Oregon (R. 412). Thompson and Coleman were seen walking together on the street in Twain Harte (R. 709–710) and were also seen at the cabin on the afternoon of August 26th—one day before the arrests—in the company of petitioner Kremen (R. 526-527). On the morning of the arrests, August 27, 1953, apparently after having spent the night in the cabin with the other persons who were arrested, Thompson and Coleman were seen leaving and entering the cabin (R. 189–192, 194), being apparently well established there (R. 189, 192–195, 210–212; G. Exs. 14–18, A–1 through A–14).

The "Steinberg" group, on the other hand, appears to have commenced operations on or about June 20, 1953, when petitioner Kremen went to Twain Harte for the purpose of renting a secluded cabin in a quiet spot (R. 619–620). After finding the cabin, petitioner Kremen gave the real estate agent a deposit of $25 and paid the balance of the first month's rent on June 25th (R. 622). Petitioners Kremen and Steinberg had moved into the cabin not later than early July, when the owner of the cabin, Mr. Germany, and his wife were invited to have breakfast with those two petitioners at the cabin (R. 668–669). Steinberg and Kremen remained in Twain Harte during July and August and were regular customers in the local food market (R. 676, 682–683). As stated above, Thompson and Coleman joined this group at

the cabin within a week, and probably only a day or two, prior to the arrests.

On the basis of these facts, the jury was fully warranted in finding that two separate and distinct conspiracies existed; that one of these was the conspiracy (charged in the second count) to "receive, relieve, comfort and assist" Thompson, with knowledge of Thompson's Smith Act conviction, in order to "hinder and prevent his apprehension and punishment" (R. 4); that the other was the conspiracy (charged in the fourth count) to "harbor and conceal" Steinberg, with knowledge of the existence of an outstanding warrant for Steinberg's arrest, in order to "prevent his discovery and arrest" (R. 6–7); and that these conspiracies were originally formed at different times and at different places and with different original members. The jury was further warranted in finding that, while petitioners Kremen and Coleman were both ultimately members of both conspiracies, and while each may have been an original member of one of the conspiracies (not, however, of the same one), neither was an original member of both conspiracies.

In other words, the evidence tends to show, and the jury was accordingly justified in concluding, that petitioner Kremen, who had previously (since at least as early as June 20, 1953; see *supra*, p. 51) been a member of the conspiracy involving the harboring of Steinberg at the Twain Harte cabin, subsequently became a member of the conspiracy involving the rendering of comfort and assistance to Thompson, when Thompson and Coleman arrived at the cabin

some time during the week preceding the arrests; and that petitioner Coleman, who had previously (since at least as early as the 1953 Decoration Day weekend; see *supra*, p. 50) been a member of the conspiracy involving the giving of comfort and assistance to Thompson, later became a member of the other conspiracy, when he (Coleman) and Thompson arrived at the Twain Harte cabin. The two conspiracies became linked up when Coleman and Thompson arrived at the cabin, but only in the sense that the members of each joined the other, and commenced, for a while at least, to share the same roof. But there is manifestly no warrant in the evidence for petitioners' contention that there was at most only one conspiracy, which was unjustifiably "split up" into two for the purpose of "pyramiding" their offenses.

3. *The offense charged in each of the conspiracy counts is not the same offense as that charged in the corresponding substantive count*

Petitioners also contend (Br. 63–65) that "[t]he conviction of all petitioners on the conspiracy counts,[34] in addition to their convictions on the substantive counts, is invalid" (Br. 63) because, they say, the offense charged in each of the conspiracy counts is the same offense as that charged in the correspond-

[34] In fact, petitioner Steinberg was convicted on but one of the conspiracy counts, count 2, this being the only one of the conspiracy counts in which he was charged (*supra*, pp. 4–5). However, this fact does not prevent him from benefiting from such merit as the present contention may have.

ing substantive count. Since petitioner Kremen's sentences on all counts were designated to run concurrently (*supra*, p. 14), this contention, like the two preceding ones (see *supra*, pp. 44, 48), and for the same reason, is not helpful to her.

It is settled that conspiracy to commit an offense is distinct from the substantive offense which is the object of the conspiracy, and may be separately punished. *Pereira* v. *United States*, 347 U. S. 1, 11; *Pinkerton* v. *United States*, 328 U. S. 640, 643–644, and cases cited. Of course, if "the agreement of two persons *is necessary for* the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime"[35] (*Pinkerton* v. *United States*, *supra*, at 643, emphasis added), a conspiracy charge "may not be added to the substantive charge" (*ibid.*). But this principle has no applicability here since, as petitioners concede, "one person alone may commit the crimes of accessoryship or harboring" (Br. 63).

Petitioners attempt to escape the effect of their concession by arguing that, although the crimes of

[35] The crime (sale of liquor) involved in *United States* v. *Katz*, 271 U. S. 354, which case is cited for the principle in *Pinkerton*, at 643, is an example of this type of substantive offense. Petitioners' reliance on the *Katz* case (Br. 65) is thus misplaced. Equally misplaced is their reliance (*ibid.*) on *Gebardi* v. *United States*, 287 U. S. 112. That case (transportation of a woman, with her consent, in violation of the Mann Act) involves the basically identical principle that, "where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime" (*Pinkerton*, at 643, citing *Gebardi*), a conspiracy charge will not lie in addition to the substantive charge.

accessoryship and harboring do not *necessarily* volve multiple defendants, where, as here, "a mu plicity of defendants are" *in fact* "involved in harboring or accessoryship situation, they of nec sity must act in concert. * * * In other words, two or more persons, at the same time and place, h bor a fugitive or are accessories after the fact t crime, they must act in concert" (Br. 63–64). E the decisions to which we have referred (*supra*, p. 5 make clear that it is only where the substantive offe sive is such that by its very nature it requires conc of action, or the agreement of two or more perso that a charge of conspiracy may not be laid. Sin the substantive offenses here in issue are conceded not of this type, petitioners' argument fails. W agree with petitioners that "[i]t is inconceivable th more than one person can commit these substanti offenses", in the manner in which the evidence at b showed them to have been committed, "without the being at least an 'implied' agreement" (Br. 64) t commit them. This fact, however, serves but to em phasize the solid character of the evidence from whic the jury inferred the existence in fact of the conspira cies charged.

B. RECEIVING AND ASSISTING ONE WHO, HAVING ALREADY BEEN CONVICTED OF AN OFFENSE AGAINST THE UNITED STATES, HAS FLE FROM JUSTICE, IN ORDER TO HINDER AND PREVENT HIS APPREHENSION AND PUNISHMENT, CONSTITUTES, WITHIN THE MEANING O 18 U. S. C. 3, ACCESSORYSHIP AFTER THE FACT TO THE OFFENSE O WHICH THE FUGITIVE WAS CONVICTED

Petitioners next contend (Br. 66–73) that thei convictions on the first, or accessoryship after the

fact, count cannot be sustained because, at the time of their alleged acts of accessoryship, Thompson had already been convicted of the offense (violation of the Smith Act) to which they were charged as accessories. "[T]he accessory after the fact statute", they say, "was never intended to apply to assistance rendered a fugitive * * * after his conviction * * * of the principal offense" (Br. 66).

The contention is without merit. It is refuted both by the plain language of the accessory statute and by the pertinent authorities of the common law, from which petitioners concede the statutory definition to have been derived (Br. 66–67).

An accessory after the fact is defined by 18 U. S. C. 3 as one who, —

> * * * knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial *or punishment* * * *. [Emphasis added]

Punishment[36] can only be imposed *after conviction.* The substance of a sentence consists of the kind and amount of punishment adjudged. *Sengstack* v. *Hill,* 16 F. Supp. 61, 62 (M. D. Pa.).

It is to be noted that the clause of the statutory definition, *supra,* which refers to the purpose for which the accessory receives or assists the person who

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[36] Punishment, contrary to petitioners' contention (Br. 69), is not an ambiguous word, especially within the context of the statute. Hence, such cases as *Pierce* v. *United States,* 314 U. S. 306, *United States* v. *Weitzel,* 246 U. S. 533, and *Lanzetta* v. *New Jersey,* 306 U. S. 451, cited by petitioners (Br. 69–70), are inapplicable.

has committed the pricipal offense, makes reference to three distinct stages of a criminal action, *viz.*, apprehension, trial, and punishment. It is significant, moreover, that these stages are set forth in the sequence in which they normally occur in a criminal action (apprehension, trial, and, if convicted, punishment). In order to give the word "punishment" in 18 U. S. C. 3 its normal meaning in the context in which it appears, it is plainly necessary to construe the statute as including within the ambit of accessoryship after the fact the rendering of assistance to a convicted fugitive for the purpose of enabling him to avoid execution of the sentence.

The heart of petitioners' contention lies in their interpretation of the meaning of accessoryship after the fact at common law. If that interpretation is mistaken, their whole argument falls.

Blackstone defies accessoryship after the fact as follows (4 *Commentaries*, 37–38):

> And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessary. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him.[37]

Thus Blackstone gives equal emphasis, as does the statute here in issue (which would appear to be derived from Blackstone), to all three elements in the

[37] To the same effect, see Bishop, *Criminal Law*, Vol. 1 (9th ed.), § 695, p. 500.

clause defining the purpose required to make one an accessory—apprehension, trial, and punishment. Bishop, in discussing the crime of aiding a felon to escape, states (*Criminal Law*, Vol. 2, (9th ed.), § 1069, p. 801):

> * * * The accessorial offense may be equally committed by any other assistance given [the felon] *at any time after* his felony; as, by facilitating his escape from confinement, or by harboring or concealing him knowing of his guilt,—it being immaterial whether he has been arrested *or otherwise proceeded against*, or not. [Emphasis added.]

The clear implication is that at common law one who aided a felon after the latter's conviction was an accessory to the principal crime.[38]

This, indeed, was the specific holding of *Rex* v. *Burridge*, 3 P. Wms. 439, 24 Eng. Reprint 1133 (King's Bench, 1735). In that case, Burridge had been indicted for having willfully and feloniously "aid[ed] and assist[ed]" one Palmer to escape from jail, to which he had been committed pursuant to a judgment of conviction for theft. The question before the court was the sufficiency of the indictment to charge Burridge with a felony (3 P. Wms. at 483, 24 Eng. Reprint at 1149). Lord Chief Justice

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[38] *Dent* v. *State*, 43 Tex. Cr. 126, 65 S. W. 627, cited by petitioners (Br. 71, fn. 59), is not to the contrary. The language of *Dent* on which they rely is found in the concurring opinion, not in the majority opinion. Also it should be noted that the dissent in *Dent* took issue with the concurring judge's reasoning and cited *Rex* v. *Burridge*, 3 P. Wms. 439, 24 Eng. Reprint 1133 (see the discussion of this case in the text immediately following) to support his views (see 65 S. W. at 636–643).

Hardwicke, speaking for a unanimous Court of King's Bench, held that, while the indictment was insufficient to charge "a new principal felony, substantive and distinct from the felony of" Palmer (*ibid.*), it was sufficient (unless defective for failure to allege that Burridge knew of Palmer's conviction; see fn. 39, *infra*) to charge accessoryship after the fact to Palmer's felony. "[W]e are all of opinion", said the Lord Chief Justice (3 P. Wms. at 485, 24 Eng. Reprint at 1150)—

> * * * that a man may become an accessary to a felony after the fact, by assisting a felon convict, being in custody under a sentence of transportation, to escape out of prison; provided it be such an assistance as doth in Law amount to a receiving, harbouring or comforting such felon.[39]

Petitioners' attempt to distinguish the *Burridge* case is unavailing. They point out, correctly, that *Burridge* "involved aiding a prisoner to escape" (Br. 69, fn. 58). But that fact does not distinguish the case. The significant fact about *Burridge* is that, notwithstanding that the aided person there, as here, had already been convicted of the principal offense, the accessoryship charge was held good. The crime of accessoryship after the fact is the same crime,

[39] The court held, however, that the indictment was deficient for failure to allege *scienter* on the part of Burridge, *i. e.*, knowledge of Palmer's conviction (3 P. Wms. at 493–497, 24 Eng. Reprint at 1152–1154). For this reason Burridge was ordered discharged (3 P. Wms. at 498, 500, 24 Eng. Reprint at 1154, 1155). The reporter indicates that subsequently Burridge was tried under a new indictment in which the requisite *scienter* was alleged (3 P. Wms. at 500–504, 24 Eng. Reprint at 1155–1156).

whether it consists of "facilitating [the principal] offender's] escape from confinement" or "harboring or concealing him" (Bishop, *Criminal Law*, Vol. 2, (9th ed.), § 1069, p. 801; *supra*, p. 58). The *Burridge* case is thus squarely in point and completely supports the Government's position on this issue.

Petitioners cite no authority for their contention that the accessoryship definition, as contained in 18 U. S. C. 3, should be construed more narrowly than its plain terms require. Their contention, if sound, would delete from the definition all acts of aid, comfort, and assistance rendered to admitted felons—acts done for the admitted purpose of hindering and preventing their punishment—solely because the offenders' guilt has already been conclusively established by their previous trial and conviction. This suggested limitation is not only logically untenable, but is contrary to the common-law authorities.

Nor is petitioners' contention supported by the fact that the crime of accessoryship after the fact appears in one of the early sections of the Criminal Code. They suggest (Br. 72) that it can be assumed from this fact that it was not the intent of Congress that assisting an already-convicted person to avoid punishment should constitute accessoryship after the fact to the offense of which that person was convicted, because the statutory provisions relating to crimes committed after the conviction of another person (*e. g.*, "escape and rescue" and "fugitives from justice") appear in later chapters of the Code. What petitioners overlook, however, is that accessoryship

after the fact is a *general* concept—that is to say, it relates to any kind of an offense. A person, in other words, may be an accessory after the fact to any of the substantive offenses elsewhere defined in the Criminal Code. For this reason, the logical place for the insertion of the accessoryship definition was precisely where Congress placed it—among those "General Provisions" appearing in the first chapter of the Code, alongside such other definitions as those of "felony" (§ 1), "misdemeanor" (§ 1), "principal" (§ 2), etc. Manifestly, the fact that the accessoryship definition appears in one of the early sections of the Code has no bearing on the question of whether one can be an accessory to a principal offense of which the offender has been convicted.

C. THE ELEMENT OF *SCIENTER* WAS CLEARLY PROVEN AGAINST PETITIONERS

Petitioners also argue (Br. 73–78) that their convictions were obtained without any evidence of *scienter*. This contention, too, is clearly without merit.

Criminal intent is an essential element of virtually all serious offenses. In many cases it is almost impossible to prove this mental state through direct evidence. *Holland v. United States*, 348 U. S. 121, 140. Therefore, the criminal element of *scienter* may be inferred from seemingly isolated acts if they are sufficiently numerous, even though each act standing by itself may seem unimportant. *Morissette* v. *United States*, 342 U. S. 246, 276; *Nassan* v. *United States*, 126 F. 2d 613 (C. A. 4).

In the instant case, petitioners were apprehended under very suspicious circumstances, and the evidence adduced at the trial certainly confirmed these suspicions. At the time of their arrest, they were residing in a very secluded mountain cabin under assumed names in the company of well-known fugitives from justice. Coleman and Steinberg had both been longtime cohorts of Thompson at the New York headquarters of the Communist Party (R. 505–513). Coleman had supplied Thompson with a car (R. 430, 555, 558), and accompanied him around the country (R. 565, 596, 601, 603). Steinberg, himself one of the fugitives, was in charge of and host at the cabin (R. 670–671). Both knew that Thompson was using a false name and had materially altered his appearance. It is too much to suppose that persons in their situation would not have known of the conviction and subsequent flight from justice of a top Communist Party leader like Thompson. See also *supra*, pp. 5–11.[40]

The evidence of *scienter* in the case of petitioner Kremen is no less strong. She had rented the cabin for her supposedly sick brother (R. 620–622). Her "sick brother" turned out to be petitioner Steinberg, who was neither ill nor related to her, and who was

[40] Although Chief Judge Denman dissented below, he indicated that he would sustain the convictions of petitioners Coleman and Steinberg on the accessoryship count and the corresponding conspiracy count (231 F. 2d at 181–182).

also a fugitive from justice. She was using a false name and possessed elaborate documentary indicia of a false identity (R. 362, 363; G. Ex. 86). She purchased large quantities of food (R. 676, 685, 778), bought sporting supplies (R. 701–702), performed household tasks for the occupants of the cabin (R. 193–194, 669), and saw to the maintenance of at least one of the vehicles (R. 787–789). On one of her shopping expeditions, her male companion purchased hair dye (R. 683). When apprehended, Thompson had dyed hair and a dyed mustache (R. 326).

The only rational explanation for these activities—the explanation presented to the jury by the Government—was that, with full awareness that Thompson and Steinberg were fugitives who were being sought by the Government, she wished to prevent their apprehension. On the record made at the trial there is no other reasonable explanation. In *Holland* v. *United States*, 348 U. S. 121, 138–139, this Court stated that "once the Government has established its case, the defendant remains quiet at his peril."[41] The jury was therefore justified in making the inference which was virtually compelled by the evidence. *Scienter* was more than amply proved.

[41] Petitioners' attempt to distinguish the *Holland* case (Br. 75) on the ground that it was a "tax case" is unsound. *Holland*, while a tax case, was still a *criminal* case, and the defendants there enjoyed the presumption of innocence and every other right that a defendant in any other type of criminal case is entitled to.

IV

THE FACT THAT THE ACCESSORYSHIP COUNT AT ONE POINT MISTAKENLY REFERRED TO THE PRINCIPAL OFFENSE AS CONSPIRACY TO ORGANIZE A SOCIETY FOR "THE OVERTHROW" (RATHER THAN "ADVOCATING THE OVERTHROW") OF THE GOVERNMENT BY FORCE DID NOT PREJUDICE PETITIONERS, WHO WERE CLEARLY APPRAISED OF THE NATURE OF THE CHARGE

Petitioners' argument that, because the accessoryship count at one point mistakenly referred to the principal offense of Thompson as conspiracy to organize a society for "the overthrow" (rather than "advocating the overthrow") of the Government by force (see R. 3), the count failed to charge an offense and there was a "fatal variance" between the pleading and the proof (Br. 79–83) is clearly insubstantial. As observed by Judge Lemmon in the principal affirming opinion below (R. 975; 231 F. 2d at 173):

> An inartificiality in pleading, *by way of recital* in an indictment, of the conviction of an individual who is not even a defendant in the case at bar, cannot be tortured into being a basis for reversible error in failure of proof. [Emphasis in the original]

Moreover, the count in question plainly stated, a line or two after the challenged language, that Thompson's offense had been "in violation of Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act" (R. 3). Thus, the statute violated by Thompson was specifically set forth and was incorporated by reference. This sufficed to in-

form the accused of the offense of which Thompson had been convicted and of that with which they themselves were being charged. See *McCoy* v. *United States*, 169 F. 2d 776, 780 (C. A. 9), certiorari denied, 335 U. S. 898. Under Rule 7 (c) of the Federal Rules of Criminal Procedure, providing for simplified indictments, it was not necessary to allege more than the essential facts of the offense.

Furthermore, petitioners' contention is based on but one part of the incidental recital of Thompson's offense. Count 1 charged petitioners with being accessories after the fact to the offense of Thompson, who, it was alleged, had been convicted of "conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence * * *" (R. 3). Petitioners' complaint is directed solely at the first of the two numbered clauses in the quoted excerpt. They do not, and indeed cannot, challenge the complete verbal accuracy of the second of the two clauses.

In any event, the language in the count to which petitioners object is no more than a compressed paraphrase of the language Chief Justice Vinson used in describing the conclusions of the Court of Appeals for the Second Circuit in upholding that court's decision affirming the conviction of Thompson and ten

other Communist Party leaders." There can be no doubt, we believe, that petitioners and their lawyers knew precisely the nature and the identity of the conviction to which the count in question referred.

The indictment thus fully apprised petitioners of the offense with which they were charged and it will certainly stand as a bar to any future prosecution of them for accessoryship after the fact to Thompson's crime. This is all that is required. *Hagner* v. *United States*, 285 U. S. 427, 431; *Wilson* v. *United States*, 158 F. 2d 659 (C. A. 5), certiorari denied, 330 U. S. 850. It is enough that the essential elements of the offense appear in any form, or by fair construction can be found within the terms of the indictment, considered as a whole. *Hagner* v. *United States*, *supra*, at 433; *McCoy* v. *United States*, 169 F. 2d 776, 780 (C. A. 9), certiorari denied, 335 U. S. 898. Any error, defect, irregularity, or variance which does not affect substantial rights is to be disregarded. Rule 52 (a), F. R. Crim. P. Clearly, petitioners were not prejudiced here.

With respect to petitioners' contention that there was here a fatal variance between the pleading and

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[13] Chief Justice Vinson's opinion stated that the Court of Appeals had concluded that the Communist Party's policy "worked for the overthrow of the Government by force and violence; * * * that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence." *Dennis* v. *United States*, 341 U. S. 494, 498.

the proof at the trial (Br. 82–83), it is to be remembered that the only kind of variance which is fatal is a variance which is of such a character as to affect the substantial rights of the accused. *Berger* v. *United States*, 295 U. S. 78, 82; *United States* v. *Cohen*, 175 F. 2d 82 (C. A. 2), certiorari denied, 323 U. S. 799; *Smiley* v. *United States*, 186 F. 2d 903, 905 (C. A. 9). The only "variance" claimed—a trifling variance with respect to *one part* of the incidental recital of Thompson's conviction (*supra*, pp. 64–66)—is plainly not of this type.[43]

[43] Petitioners' contention (Br. 83–86) that the trial judge erred in instructing the jury "as a matter of law" that "the record shows that Thompson was convicted" of "the crime * * * described" in the "first count of the indictment" (R. 913–914; see Br. 84, fn. 68) is but another facet of their contention that there was a fatal variance between the pleading and the proof in the respect to which we have referred in the text. It has, consequently, no more merit than the "fatal variance" argument itself. For the same reasons to which we have referred with respect to that argument, the instruction of which petitioners complain could not possibly have prejudiced them. It is to be noted, furthermore, that in the concluding sentence of the pertinent passage of the instructions the judge specifically and correctly described Thompson's offense as "the crime of conspiring to teach the overthrow and destruction of the United States Government by force and violence" (R. 914; Br. 84, fn. 68). Judge Lemmon correctly characterized the present contention of petitioners as an unwarranted effort to "magnif[y]" "incomplete language in [the] trial judge's instructions" into "a basis for reversible error" (R. 975; 231 F. 2d at 173).

It should also be noted that petitioners do not question the propriety of the judge's removal of the question of the fact of Thompson's Smith Act conviction from the jury's consideration. And since the fact of that conviction is a matter of official court record, in this as well as other federal courts, it was clearly proper for the judge to do so.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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